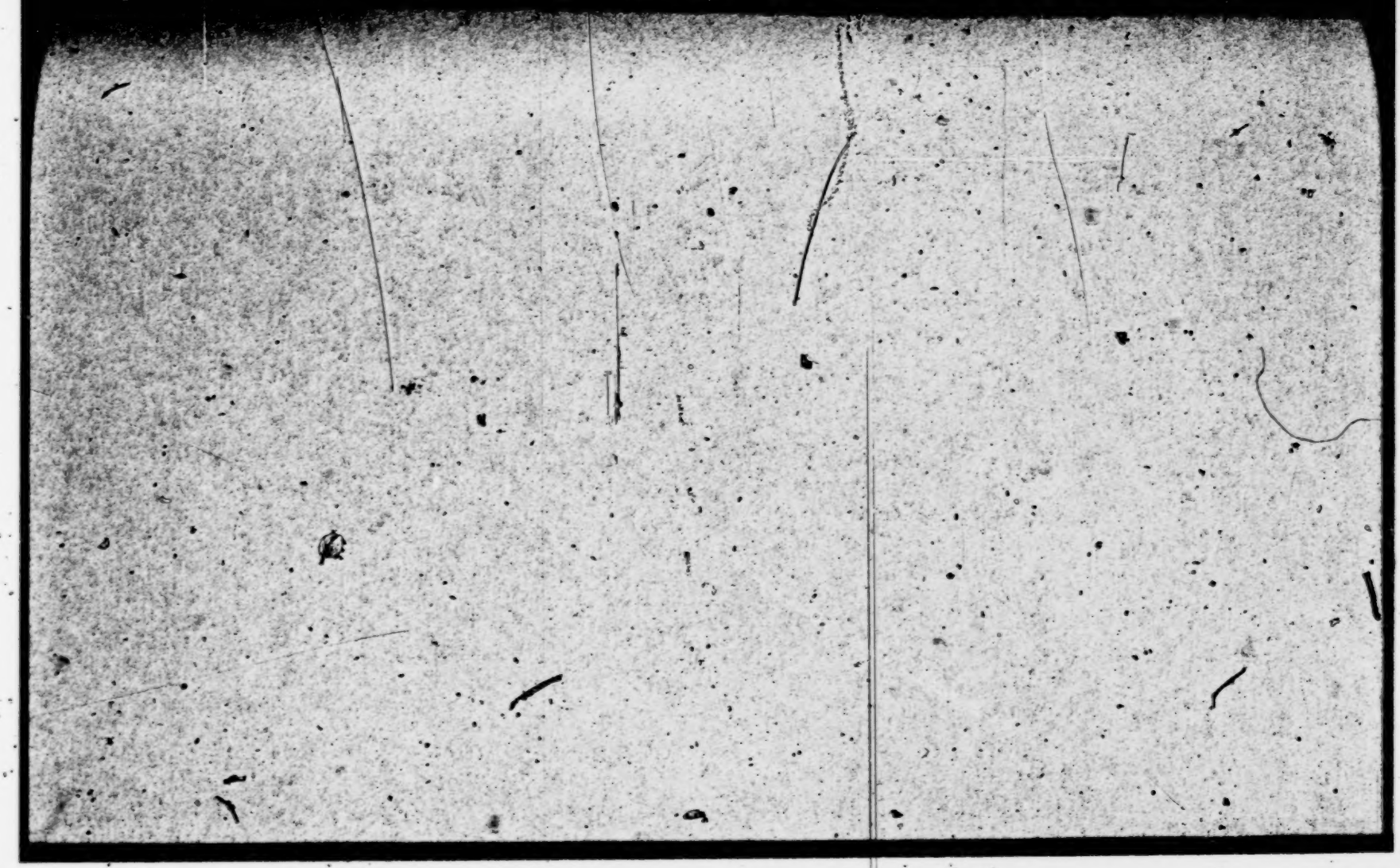

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In the Supreme Court of the United States

OCTOBER TERM, 1903.

No. 575.

JOHN L. GILFARY,

Petitioner,

vs.

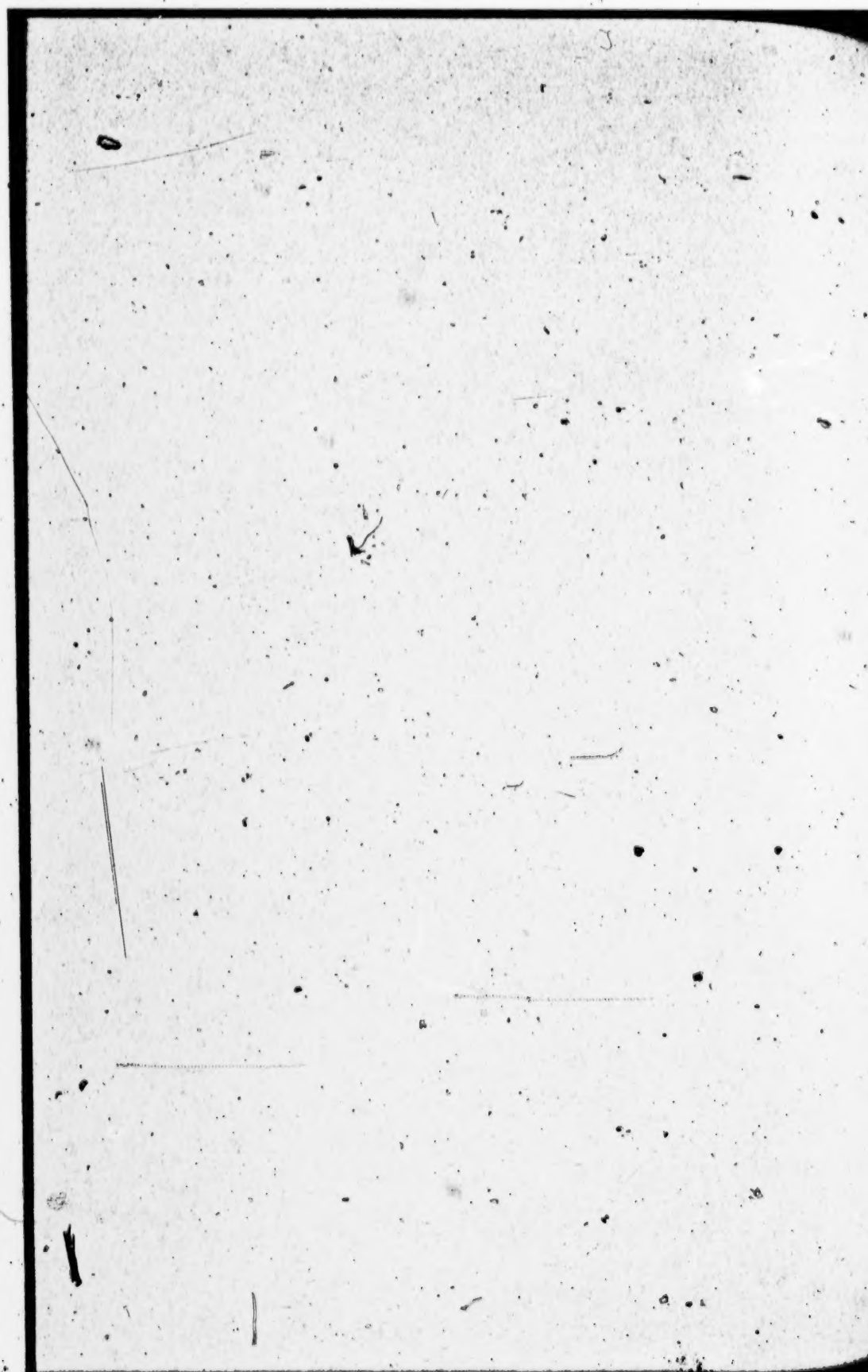
THE CUYAHOGA VALLEY RAILWAY COMPANY,

Respondent.

BRIEF ON BEHALF OF RESPONDENT.

W. T. KINDER,
H. CHAPMAN ROSE,
Attorneys for Respondent.

THE GAZETTE LEGAL PUBLISHING CO., CLEVELAND, OHIO



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vs.

THE CUYAHOGA VALLEY RAILWAY COMPANY,
Respondent.

BRIEF ON BEHALF OF RESPONDENT.

STATEMENT.

Petitioner and Respondent will hereinafter be referred to by name or as "plaintiff" and "defendant."

In view of the fact that, as indicated in defendant's brief on plaintiff's petition for certiorari, the record presents questions in addition to the validity of the agreement between plaintiff and defendant on which the judgment of the Ohio Supreme Court and Court of Appeals rest and with respect to which this Court granted certiorari, and which questions go to the right of plaintiff to recover in any event, we regard it essential that the case, including the facts, be treated in more detail than is done in petitioner's brief here.

THE CASE.

Plaintiff was injured while in the employ of the defendant as a switchman, his injury arising out of the movement, or attempted movement, of certain freight cars within the plant of The Otis Steel Company. At the time of the accident both he and the defendant were engaged in *intrastate* commerce.*

Plaintiff's petition (Rec. 9) contained originally five assignments of negligence. At the trial (Rec. 40) four of these were withdrawn and plaintiff's case rests *solely* on the claim that his injury was caused by the alleged defective condition of the couplers of two of defendant's cars, which he as a brakeman was at the time engaged in coupling together.

The answer of the defendant (Rec. 12) tendered the following defenses: first: a denial that the couplers were defective; second: the assertion that plaintiff under the circumstances assumed the risk of the accident; and third: that—

> (a) at the time of the accident plaintiff and defendant were engaged in *intrastate* commerce, and (b) the State of Ohio by its Constitution, as amended and effective January 1, 1924, provided for a system of workmen's compensation and that such compensation—
>
> "shall be in lieu of all other rights to compensation or damages for * * * injuries * * * and that any employer who pays the premium or compensation provided in the law shall not be liable to respond in damages at common law or by statute for such injuries * * *." (c) that the defendant had in all respects complied with the Workmen's Compensation Law of the State of Ohio; and (d) that as permitted, but not

---

* Italics in this brief are those of respondent unless otherwise indicated.

compelled, by such law of Ohio the plaintiff and defendant had voluntarily entered into an express written agreement by which they had each agreed to accept and be bound by the provisions of the Ohio Compensation Law and that pursuant to such agreement they had filed a written acceptance thereof with the Industrial Commission of Ohio and which said written acceptance had been approved by said Commission.

Plaintiff's reply (Rec. 14), so far as it concerns the defendant's third defense, denied "for want of knowledge" (a) defendant's compliance with the Compensation Law and (b) denied further that he "at any time accepted the provisions of that law or subjected himself to the operation thereof." He further expressly averred that his action was founded upon "the Safety Appliance Act of the United States" and that the Compensation Law of Ohio was inoperative and also that the third defense did not constitute a defense to the petition. In view of the conceded facts (hereinafter appearing) with respect to defendant's compliance with the law and plaintiff's execution of the contract, the reply becomes merely a conclusion of law.

THE FACTS.

Upon the issues thus made the facts of the case as developed on trial are as follows:

The defendant is in effect an intra-mill railroad, located within the plant of The Otis Steel Company in the City of Cleveland. By reason of the fact that it connects with certain trunk line railroads it engages upon occasion in interstate commerce, *i.e.*, in moving interstate consigned freight to and from the Otis Steel plant to its connecting trunk line railroads. Most of its work is, however, intrastate.

On the occasion of this accident, however, it was *not* engaged in interstate commerce but on the contrary it is conceded that operation in which Gilvary and the other members of his crew were engaged was *intrastate* in character and involved the movement of cars within the plant of The Otis Steel Company. It was in effect not only an *intra*state movement or an *intra*city movement but an *intra*plant operation.

The accident occurred at a curve on what is known as the east slab yard track. The three tracks involved known as the "running track," the west slab yard track and the east slab yard track, hereinafter called the "west" and "east" tracks, respectively. Their relative location, including the switches, are shown by a map—defendant's exhibit 1—and photograph defendant's exhibit 5. (Rec. 196A.) These tracks extend north and south, are parallel—the most westerly being the running track, the middle the west track and the most easterly being the east track. The right hand of the map is north, the left south. It will be noted that at the north end of the west track a switch connects the west track with the running track and the east track in turn runs into, by a switch, the west track.

There are two curves in this east track, one as it swings off the west track and one where it straightens out again. (defendant's exhibits 1 and 5.) The first curve is 20° 45′ in extent and the second, where the accident occurred, is 10° in extent. (Rec. 154.)

At and prior to the accident there stood on the east track several cars, the most northerly of which was a P. McK. & Y. loaded hopper car the north end of which was at the point of the second or 10° curve, about two car lengths (75 to 80 feet) from the switch leading into the west track. It was on to this car that the coupling was to be made. Gilvary's crew, of which he was the field man, consisted of Melvin, conductor, Skuce, head brake-

man, and Cornell, the engineer. The engine was headed north and had prior to the accident done some switching on the running and west track and had pulled down the west track with six cars attached, to a point to clear the switch on to the east track, it being there intended to back down into the east track and couple onto the standing P. McK. & Y. car. It was Gilvary's duty to supervise the making of this coupling and he had for that purpose come across from the west track and taken his position alongside (east) of the east track but at the northerly end of the P. McK. & Y. car while the engine with six cars attached had pulled north on the west track preparatory to backing up into the east track when the switch was thrown. Melvin threw the east track switch. The cut of cars moved slowly back (south), Melvin having signalled such movement, which was in turn relayed to the engineer by the head brakeman Skuce near the engine but about forty feet away (east) from the track.

The most southerly car of those attached to the engine and the one which was to couple on to the P. McK. & Y. car was a B. & O. gondola. Photographs of these cars are shown by defendant's exhibits 5, 6, 7 and 8. (Rec. 196A to 196D; the original photographs are available to the Court.)

It is at this point that the differences in fact between plaintiff on the one hand and the members of his crew on the other develop.

Gilvary's version is in substance to the effect that as the cars headed by the B. & O. car (the knuckle of the coupler of which was closed) came back and were within a half a car length of the P. McK. & Y. car (the knuckle of which was open) he gave a "steady" signal and as the cars came back he swung down, such signals according to Gilvary's claim being given by him directly to the engineer; that the coupling did not make but that the impact

having knocked back the P. McK. & Y. car he blocked this car and proceeded to open the knuckle which was closed in the coupling attempt and then signalled the engineer to again back up; that the cars came back and again failed to couple, the knuckle on the P. McK. & Y. car again closing. Gilvary testifies that he again blocked the P. McK. & Y. car but being then unable to open the knuckle with the lever he decided to go between the cars and *swing the engineer down*. Gilvary claims that the engineer *answered him by wave of the hand*; (Rec. 49, 76) that he, Gilvary, then went in between the cars, endeavored to open the P. McK. & Y. coupler by hand and being unable to do so attempted to line up the draw-bar and open the knuckle on the B. & O. car (the cutting lever of which was on the opposite side of the car) and that as he had his left arm about the draw-bar of the B. & O. car the train was moved back and his arm was caught between the coupler on the B. & O. car and the P. McK. & Y. car and he was thus injured. Plaintiff's testimony, in other words, is to the effect —and he expressly so testifies (Rec. 76, 77)—that the engineer, contrary to the exchange of signals, moved the cars back, thus causing the accident. We emphasize this in passing because if in law the negligence of the engineer was the proximate cause of the accident, and the disputed condition of the couplers merely the condition—*Lang. v. Railroad*, 255 U. S. 455,—no question would exist but that the agreement would bar recovery.

Opposed however to this version of the accident are the following facts tending to establish, among other things, that the couplers were not defective:

(a) Circumstantial evidence that by reason of the curve in the track (there being a slight down-grade south to the point of curve), the presence of a lumber pile alongside the track and the distance of the locomotive from the point of attempted coupling, it was a physical impossibility

for Gilvary to have seen the locomotive or transmitted signals directly to the engineer.

(b) The testimony of Melvin (Rec. 87), conductor, Skuce (Rec. 133), head brakeman and Cornell (Rec. 112), engineer, to the effect that the accident occurred in the following manner: That Melvin threw the switch for the entry of the cars in on the west track at which time Gilvary was at the P. McK. & Y. car; that Melvin's signal to back up was transmitted through Skuce, the head brakeman, to the engineer and that in response to the signal the cars came back; that—

> "just about the time the coupling was to be made, why, Mr. Gilvary swung down and went between the cars and then just as he gave the signal there was a kind of an impact. I don't know whether it was the train moved a little or whether it was just the cars came back from the slack that were in the cars. Mr. Gilvary came running out holding his hand." (Rec. 90, 91.)

Skuce, the head brakeman, standing out (east) from the track about forty feet so that he could see testifies that after Melvin gave the signal to back up, which he transmitted to the engineer, that after the coupling didn't make Gilvary gave a signal to stop, which he (Cornell) transmitted to the engineer; that at the time the train stopped Gilvary went in between the cars, came out, gave a signal to go ahead which he (Cornell) transmitted to the engineer, in response to which the engineer pulled ahead about six feet, stopped, at which time Gilvary went in between the cars; that then—

> "as near as I could figure out the slack from the rear of that track came back * * * then Melvin gave a wash-out signal * * * and I seen Melvin running and pretty soon he had a hold of Mr. Gilvary and brought him out * * *." (Rec. 137.)

Cornell, the engineer, says that he got the original back-up signal from Skuce, next receiving a stop signal and pursuant thereto stopped the engine, at which time he saw Skuce start to run towards the "hind end of the drag."

The testimony of Skuce, Cornell and Melvin is corroborated by a photograph showing the conditions obtaining at the time of the accident (Defendant's Exhibit 5) and discloses, as above indicated, that it was physically impossible for Gilvary and the engineer to have seen or transmitted signals directly to each other.

(c) Plaintiff testifies to no defect in either of these two couplers, his claim in that regard resting solely upon the fact that the coupling failed to make. Plaintiff in fact admits that he saw nothing broken or out of order with the standing P. McK. & Y. car. (Rec. 66.) He testifies to no observed defect in either coupler.

(d) The coupling was attempted at the point of a ten degree curve and Gilvary made no attempt prior to signaling the movement of the train back to adjust the draw-bars on either car to accommodate them to that curve although he was in charge of the coupling operation and could have stopped the movement at any time and knew when he signalled the movement back that the coupler on the Baltimore and Ohio car (the approaching car), was closed. (Rec. 64, 76.)

(e) Immediately after the accident Bawolak (Car Inspector) (Rec. 120 *et seq.*) at the direction of Keppers, yardmaster (Rec. 126 *et seq.*), and in his presence inspected both couplers, found them to be in "A No. 1 condition," the cutting lever operative and that the draw-bars (which are housed in a malleable iron "buffer casting") had the proper amount of side-play; that the cars were pulled apart, *both knuckles* were opened, the train moved back and the coupling made at the point of the ac-

cident. A written record of such inspection made forty-five minutes after the accident (defendant's exhibit 3) was offered by the defendant but upon objection by the plaintiff was excluded by the Court. Keppers participated in this inspection and corroborates Bawolak, as does Conductor Melvin, who was also present and in charge of the car movements.

Photographs of the Baltimore and Ohio coupler (defendant's exhibit 7), of the P. McK. & Y. coupler (defendant's exhibit 8) and of the two cars coupled together (defendant's exhibit 6) taken the following day show no defects.

(f) On the morning following the accident, *actual running tests were made which involved the actual coupling and uncoupling of these cars in practical operation* (there being three such tests made at different speeds). This examination and tests were conducted under the supervision of Thomas Murtaugh, Superintendent (Rec. 144), Brakeman Flieger (Rec. 146), Brechbill (Rec. 148) and Pintner (Rec. 149)—all experienced railroad men who described the tests, the condition of the appliances and all of whom testify that the couplers were not defective but in good condition.

(g) *Fitzgerald*, terminal trainmaster for the Erie Railroad, with forty-four years of railroad experience (Rec. 158); *E. O. Kerr*, yardmaster of the Nickel Plate, with thirty-two years' experience (Rec. 159), and *Gousley*, terminal trainmaster for the Baltimore & Ohio, with twenty-five years' experience (Rec. 163) testified as experts that under the facts of the case the failure of the cars to couple, in view of the curve, was no indication that the couplers were defective but that on the contrary it would be necessary on such a curve that the draw-bars of the cars be adjusted (sideways) by the brakeman to accommodate

the couplers to the curve. This evidence was not denied by any witness for plaintiff either as a part of his case in chief or on rebuttal.

In support of the third defense, *i.e.*, involving the Compensation Act of the State of Ohio, the record shows the following facts, which are conceded by the plaintiff (Rec. 201 *et seq.*):

1. That The Cuyahoga Valley Railway Company engaged in interstate and also intrastate commerce but that on the occasion of the accident both the plaintiff and defendant were engaged in *intrastate* commerce.

2. That on and prior to the date of the accident The Cuyahoga Valley Railway Company had complied with the so-called "Workmen's Compensation Law of the State of Ohio."

3. That there was on file with the Industrial Commission of Ohio an agreement known as the "Acceptance and Notice of Election by Employer and Employes Under Section 51 of the Workmen's Compensation Act," signed by the plaintiff, John L. Gilvary, and by the employer, The Cuyahoga Valley Railway Company.

4. That such agreement, known as "Acceptance and Notice of Election, etc." *had been filed with and approved by the State Liability Board of Awards*, now known as the Industrial Commission of Ohio.

5. That defendant's exhibit 2 is a true and correct copy of the agreement above referred to and is as follows:

"Form A-100

NOTE: This form, after being fully filled out, should accompany the 'Application for Classification of Premium Rating.' Form should also be filled out to cover each new employe.

THE INDUSTRIAL COMMISSION OF OHIO
COLUMBUS, OHIO.

Section 51 of Compensation Act.
(Section 1465-98 G. C.)

The provisions of this act shall apply to employers and their employes engaged in intrastate and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has been or may be established by Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate and foreign commerce, and then only when such employer and any of his workmen working only in this state, with the approval of the state liability board of awards, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this Act by filing written acceptances, which, when filed with and approved by the board, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which premiums herein provided have been paid. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid.

Acceptance and Notice of Election by Employer and Employes Under Section 51 of Workmen's Compensation Act.

To The Industrial Division of Ohio:

The undersigned employer, being engaged in intrastate and also in interstate and foreign commerce by rail, and its undersigned employes, working only in this state, whose mutual connection with intrastate work is clearly separable and distinguishable from interstate and foreign commerce, *hereby elect* that their *respective rights and liabilities* growing out of injury or death to such employes or any of them, or their dependents in case of death, *shall be governed by the provisions of the Workmen's Compen-*

sation Law of Ohio in all cases in which such injury or death is sustained while such employer or employes *are engaged in intrastate commerce.*

Said employer and employes hereby *severally request the Industrial Commission* of Ohio *to approve their election* to operate under the Workmen's Compensation Law of Ohio.

Oct. 12 1928 EMPLOYE: John Gilvary."

This contract between Gilvary and the Railway Company was as to each entirely voluntary. We use the word "voluntary" both in the sense (1) that the Ohio statute, under the permission of which the contract was entered into, did not compel or require any such action by either the plaintiff or the defendant; and (2) that as between the parties, *i.e.*, the plaintiff as an employe, and the defendant as his employer, there is in this regard to be found no allegation, claim or fact to the contrary. Plaintiff's reply to the third defense of defendant's answer amounts, when considered in connection with the conceded facts, (Rec. 201, *et seq.*) to nothing more than a demurrer to the defense pleaded. He does not in his pleading deny the fact, as alleged in defendant's answer, that he and the defendant "voluntarily accepted the provisions of said Workmen's Compensation Law * * *." (Rec. 13.) In Ohio, by statute G. C. 11329, failure to deny constitutes an admission of a material averment. Nor does his testimony, either in chief or on rebuttal, contain any such denial. In fact his testimony contains no reference to the contract but by stipulation the plaintiff expressly concedes not only that he signed the contract or agreement but that it had been filed "and approved by the State Liability Board of Awards, now known as the Industrial Commission of Ohio."

Passing by for further discussion (1) the extent to which the plaintiff is bound by the approval of the Commission and (2) the consideration to each party supporting

this contract, we emphasize at this point the fact that the agreement here involved is voluntary both so far as concerns any authority of the State of Ohio and as concerns the parties, because running through the argument of plaintiff's brief is the premise, unsupported by the record, that in reaching this contract the parties were acting under some sort of compulsion. As shall be hereinafter demonstrated, no such compulsion existed, either under the terms of the Ohio Compensation Act or under the facts disclosed by this record.

Summed up, therefore, this agreement constitutes the voluntary act of an employer and employe, evidencing the considered acquiescence of the parties, both in law competent to so act, entered into by them under circumstances precluding the existence of any compulsion, imposition or misunderstanding and which bears the requested approval of the Industrial Commission of Ohio, an administrative body charged with jurisdiction in the premises. By such approval the state of Ohio in fact became a party to the agreement. The state's obligation in respect of the enforcement and administration of the benefits of the Act and the compensation thereby provided is treated elsewhere.

By (a) motions to direct a verdict made at the close of the opening statements of counsel, renewed at the close of plaintiff's case and at the close of all the evidence; (b) the proffer and exclusion of evidence; (c) the admission of evidence over objection; (d) exceptions to the refusal of the Court to give to the jury special instructions before argument and (e) exceptions to the general charge to the jury, the defendant raised and asserted and now asserts the following propositions:

A—A voluntary written agreement entered into between the parties as permitted or authorized but not com-

pelled or required by the law of Ohio, and at the instance of the parties approved by the State through its Industrial Commission bars this action and gives Gilvary his remedy under the Compensation law.

B—The defendant otherwise was entitled to a directed verdict in its favor because (1) the finding of the jury that there existed any defect in the coupler or couplers (the sole basis of the plaintiff's case) is not supported by the requisite degree of proof; and (2) the couplers, even if defective, constituted a condition as distinguished from the proximate cause of the accident, which if proximately due to acts (even if negligent) of plaintiff's co-employes are compensable only according to the agreement.

C—The defendant in any event is entitled to a new trial by reason of (1) the error of the court in (a) refusing to instruct the jury as requested by the defendant and (b) in the instructions given to the jury.

A—A voluntary written agreement entered into between the parties as permitted or authorized but not compelled or required by the law of Ohio, and at the instance of the parties approved by the state through its industrial commission bars this action and gives Gilvary his remedy under the Compensation Law.

The difficulty in the matter arises as the result of the assumption by plaintiff's counsel that the Ohio law "put employer or employe to an election as between Federal and state rights * * *." This is stated to be the "theory" of petitioner's brief (p. 34). But this is not true. The Ohio law does not so provide; and we turn to a discussion of this proposition, as follows:

1—The Ohio law;

2—The contract between the parties; and

3—The question of estoppel.

1—The Ohio law.

By express Constitutional provisions (Art. II, Secs. 34 and 35)[1] the State of Ohio has authorized the enactment "in respect of all employes" of laws having to do with hours of labor, minimum wage and the comfort, health, safety and general welfare. In addition thereto, by Sec. 35 of the same Article, the Constitution authorizes the enactment of laws providing "compensation to workmen and their dependents for death, injuries or occupational disease occasioned in the course of such workmen's employment," and the creation of a Workmen's Compensation Fund by compulsion of contribution thereto by employers. In addition to providing that compensation to an employe may be increased by an additional fifty per cent in the event of an injury caused by a violation of a safety requirement, this section of the Constitution contains the following provision:

> "Such compensation shall be in lieu of all other rights to compensation or damages for such death, injuries or occupational disease and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease."

Pursuant to this constitutional provision, the legislature of the state did enact a law providing for a system of workmen's compensation. G. C. Secs. 1465-37, *et seq.* The statute, the validity of which has been upheld against attack (*Jeffrey v. Blagg*, 235 U. S. 571; *Thornton v. Duffy*, 254 U. S. 361; *State ex rel. Yaple v. Creamer*, 85 O. S. 349, 97 N. E. 602) is in general similar to legislation of other

[1] These provisions together with references to certain applicable provisions of the Ohio Compensation Act are for convenience inserted in Appendix A hereof.

states, the validity of which has been sustained. *Railroad v. White*, 243 U. S. 188; *Arizona Employers' Liability Cases*, 250 U. S. 400; *Timber Co. v. Washington*, 243 U. S. 219; *Packing Co. v. Parramore*, 263 U. S. 418. Briefly, employers subject to the law are those which have in service three or more workmen and an employe under the Act is a workman of an employer employing three or more persons. G. C. 1465-60-61. Employments are classified and the premium rates therefor are fixed. Employers as may be financially qualified so to do may compensate their employes directly (Sec. 1465-69), otherwise the Compensation Fund is administered by the State Commission. Every employe, or his dependents in the case of his death, who is incapacitated by injury or occupational disease sustained in the course of his employment "wherever such injury has occurred" is entitled to compensation. Sec. 1465-68-a. Penalties are provided in respect of non-compliance by employers, both civil (1465-74) and penal (1465-69a). Claims for compensation awarded or any judgment obtained in any action prosecuted by the state under the Act is given the same preference as judgments rendered on claims for taxes (1465-77). Compensation is exempt from attachment and execution and in the event of insolvency of the employer the compensation awarded has the priority of taxes and costs. Sec. 1465-88. The attorney general of the state or prosecuting attorney of the county constitute the law officers charged with the institution and prosecution of any action necessary to the enforcement of the law. Sec. 1465-100.

All contracts insuring or indemnifying an employer against compensation liability are declared void. Sec. 1465-101.

The Act (G. C. 1465-70) further provides that—

> "Employers who comply with the provisions of the last preceding section * * * *shall not be liable to*

respond in damages at common law or by statute * * * for injury or death of any employe wherever occurring, during the period covered by such premium so paid * * * or during the interval of time in which such employer is permitted to pay such compensation direct."

Generally speaking the power of the state in the administration of the Act, the insurance of the payment of its benefits, the solvency of the fund, etc., is behind the system thus created.

We now turn to the provision of the Act (Sec. 1465-98) permitting a contract such as is here involved. This provision of the law appears on the face of the contract itself and is quoted in plaintiff's brief and is not here repeated. Its terms clearly evidence a studied effort on the part of the legislature to avoid any interference with the subject-matter of *interstate* commerce which had already been dealt with by Congress in the enactment of the Federal Liability Act. In substance and with respect to a railroad, the provisions of the Compensation Law of Ohio may by this section be made available upon the existence of certain conditions, to-wit: (a) where the employer is engaged in intrastate work "clearly separable and distinguished from interstate commerce * * *" (b) "then only" when the employer and employe—

"*with the approval of the State Liability Board of Awards* and so far as not forbidden by any Act of Congress, *voluntarily* accept the provisions of this Act by filing written acceptances, which when filed with and approved by the Board * * * shall subject the acceptors irrevocably to the provisions of this Act to all intents and purposes as if they had been originally included in its terms * * *. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid."

It is entirely obvious that there is here no attempt to apply the Act or any contract thereunder to interstate com-

merce and that the operation of the law is thereby limited to intrastate commerce. It is by express words made clear that the "*acceptance*" of the act by employer and employe is *voluntary* and in addition thereto must receive the *approval* of the State Liability Board of Awards (now the Industrial Commission, Sec. 871-1, *et seq.*). To state that this section puts "the employer and employe to an election" or to attempt to spell out of the provisions of this law any idea of coercion or compulsion by the state is, it seems to us, to ignore the plain meaning of the carefully employed language of the section. On the contrary the fact that the Act is in this regard entirely voluntary has been judicially recognized in decisions construing this particular section. *Connole v. Railroad Co.*, 216 Fed. 823, 825, 826; *State ex rel. Industrial Commission*, 100 O. S. 500, 504, 127 N. E. 595; *Hogan v. B. & O.*, 15 Fed. (2nd) 739. Here the Court of Appeals of the Sixth Circuit, on page 740, says:

> "The Act is elective but the right of election does not rest alone with the employer. The employe also has an option and his voluntary acceptance as well as the employer's must be approved by the Board of Awards. * * * Thus there is a discretion in the employe and the Board."[1]

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[1] Attention is called to the fact that the original Workmen's Compensation Act of Ohio of 1911 (102 Ohio Laws 524) amplified in 103 Ohio Laws 72, was elective in the sense that a non-complying employer was deprived of certain defenses in an action at law. *State ex rel. vs. Creamer*, 85 O. S. 349; 97 N. E. 602. In 1913 (103 Ohio Laws 72), pursuant to an amendment to the Constitution (Art. II, Sec. 35) adopted in 1912, the Act became compulsory in the sense that all employers were required to comply. *Industrial Commission vs. Weigandt*, 102 O. S. 1; 130 N. E. 38. Under G. C. 1475-98 enacted as a part of the 1913 statute, the present Compensation Law although compulsory is optional or elective as to the business of railroad operation and employer and employes engaged therein.

There is, therefore, in the Ohio law no provision which, by way of or through a statutory presumption, attempts to create a contract upon inaction by either party either with or without notice in respect of the provisions of the Act. In other words, there exists, under the provisions of the Ohio law, no compulsion of law *as law* under which the parties may be said to be bound upon failure to act. On the contrary, the Ohio law requires an affirmative voluntary act by the parties and the approval of its Commission. The "approval" of the Commission, in other words, the exercise by an administrative tribunal of a power conferred on it by the law, conclusively fixes, of course, as between these parties, any *fact* requisite to the Commission's exercise of such power and finding thereby made. *Phillips vs. Commissioner*, 283 U. S. 589, 600; *Mutual Film Corp. vs. Ohio Industrial Commission*, 236 U. S. 230, 245.

It follows, therefore, that it is not now open to either party to either question that the contracting parties were not an employer and employe within this statute or that their action in accepting the provisions thereof was not voluntary.

Every condition of this section is met by the conceded facts (Stipulation, Rec. 201), towit, the company and Gilvary, working only in this state, voluntarily and over their respective signatures, accepted the provisions of the Compensation Act by filing such acceptance (defendant's exhibit 2, Rec. 202) which in express terms (a) defines both plaintiff and defendant as being employe and employer of a character and status within the Act and (b) requests the Industrial Commission to approve such acceptance. Pursuant to such voluntary act by the parties, acceptance was filed with and received the approval of the Commission. The Company had complied with the Workmen's Compen-

sation Act, including payment of premiums based upon such acceptance.

Before reference to decided cases we turn now to—

2—The contract between the parties.

Disregarding the form of the contract, in substance it amounts to no more than an ordinary contract between plaintiff and defendant that each, in consideration of benefits secured thereunder and which otherwise would not be available, would forego certain rights which each party would, depending on future contingencies, otherwise have in the performance by each of the intrastate operations of the employer. The parties actually agreed that—

> "their respective rights and liabilities growing out of injury or death shall be governed by the provisions of the Workmen's Compensation Law of Ohio in all cases in which such injury or death is sustained while such employer or employees are engaged in intrastate commerce."

The agreement thus contained its own definition of its scope. The courts of Ohio in construing the Ohio statute permitting such a contract (G. C. 1465-98) have in this case held not only that this section authorized a contract which by its terms would include the surrender of a right of action under the Safety Appliance Act but also that the contract itself (which includes the section of the law involved) did include, and the plaintiff thereby surrendered, a right of action under the Federal Safety Appliance Act. It, therefore, follows that point 3 of petitioner's brief (pages 36, *et seq.*), that the contract did not include a right under the Safety Appliance Act is not now open to him in this Court.

The rule has been applied by this Court in respect of the construction placed upon the Ohio Compensation Act by the Ohio Supreme Court in *Thornton v. Duffy*, 254 U. S.

361, and with respect to the compensation law of Utah, *Packing Co. v. Parramore*, 263 U. S. 418.

The construction placed on a state statute as to a state matter is conclusive. *Quong Ham Wah v. Commission*, 255 U. S. 445.

The decision of the highest court of the state as to the construction of a statute and whether articles are included within its prohibition is accepted by this Court, which then determines whether the statute thus construed is valid. *Price v. People*, 238 U. S. 446; *Purity etc. Co. v. Lynch*, 226 U. S. 192; *Lindsey v. Gas Co.*, 220 U. S. 61, 73.

The power of a state court to determine the meaning of a statute includes the power to define its extent and limitations. *Sunday v. Kansas*, 196 U. S. 447. See also *Brinkerhoff etc. Co. v. Hill*, 281 U. S. 673, 680.

It seems, therefore, to us that the judgment below, in so far as it involves the meaning and construction of G. C. Sec. 1465-98, must be accepted here and the validity of the statute tested by the construction given it, which is necessarily that the statute included permission to the employer and employe engaged in intrastate commerce to voluntarily surrender a right under the Safety Appliance Act. The contract entered into under such statute was expressly so construed by the Ohio Court of Appeals, (Rec. 3) and this decision was affirmed by the Supreme Court. The contract included the statute (defendant's exhibit 2) and its construction as to what was included by its terms is a matter of local law, *i.e.*, the meaning, extent and terms of an Ohio contract expressly authorized by an Ohio statute. This is binding here. *Express Co. v. Kentucky*, 273 U. S. 269; *Michigan v. Trust Co.*, 286 U. S. 334, 343, 344.

In connection with the contract itself it is fair to consider the benefits acquired by each party under the contract and also the rights which each thereby gave up. The defendant is a railroad and in the operation of its business

in intrastate commerce (no right of the plaintiff arising out of an engagement in interstate commerce is affected by this contract) is aside from the Compensation Act regulated in respect of its liability to its employes in the event of injury and death by certain statutes. G. C. Sec. 6443, *et seq.* and G. C. Secs. 9015 to 9018. These for the purpose of this discussion may be assumed to be and are as a matter of fact similar to the provisions of the Federal Employers' Liability Act applicable to the liability of railroads to their employes engaged in interstate commerce. Negligence is an essential condition of recovery. Contributory negligence is a *pro rata* defense, except in the case of violation of a safety requirement. Assumption of risk is a defense except where the accident is contributed to by violation of a safety requirement and while, in substance, it is similar to that defense as it has been defined under the Federal Employers' Liability Act, there are certain situations in Ohio in which an employe may assume the risk of negligence of a fellow servant so that generally speaking the defense of assumption of risk in Ohio is of wider scope than that under the Federal Employers' Liability Act. Hence it may be said that an Ohio railroad employer in respect of an accident occurring in intrastate commerce is liable only in the event of negligence and in addition thereto may plead the defense of contributory negligence and assumption of risk, but if negligent and no defenses appearing, is subject to liability in an amount fixed by the particular jury and dependent upon the extent of the injuries. Conversely, an employe of such an employer, engaged in intrastate commerce may not recover unless the injury sustained by him was occasioned by negligence and even here if he be also free from contributory negligence (a *pro rata* defense) and free from a knowledge of the hazard which permits the application of the doctrine of assumption of risk. He has,

however, once liability is established, the right to a verdict at the hands of a jury, depending on the injuries. For any injury sustained by him, or in the event of his death—the result of no negligence or if the result of negligence the risk of which he assumed—neither he nor his dependents in the event of his death are entitled to recover.

It is this sort of a situation and upon the reasons flowing therefrom that compensation laws have been passed in forty-four states of the country. In fact the advantages and benefits of workmen's compensation legislation as applied to railroads over a system furnished by a statutory regulation of employers' liability, *e.g.*, the Federal Employers' Liability Act, have been stressed in a recent (January, 1934) number of the *Harvard Law Review*, where in an elaborate discussion of the matter in an article entitled "Workmen's Compensation on Interstate Railways" there is advocated the repeal of the Federal Employers' Liability Act, with the consequent transfer of the subject-matter thereby regulated (liability in interstate commerce) to the states for administration under their respective compensation laws.

The matter has been the subject of comment by this Court in *Railroad v. White*, 243 U. S. 188, where on pages 201 *et seq.* are considered the advantages to the employer and employe of a method of state compensation. It clearly follows that the advantages and disadvantages of the common law or statutory regulation of liability constitutes adequate consideration for a contract of this character. In addition thereto, under the Ohio law, the employe and his dependents acquire protection as against disability and death due to an occupational disease for which there was no liability prior to the enactment of the present compensation law. *Commission vs. Brown*, 92 O. S. 309, 312; 110 N. E. 744.

No decision has intimated that, if an employe possesses a cause of action against a railroad for a violation of the Federal Safety Appliance Act, he may not voluntarily release it, by contract upon good consideration, which derives its force from the law of the State where it is made. There is no difference in principle between such a release after the fact, and an agreement made beforehand upon good consideration, fixing a fair and equitable means whereby injuries, both negligent and non-negligent, which might otherwise give rise to causes of action under the Safety Appliance Act, may be compensated for.

Gilvary's contract upon which the Railway relies does nothing more than this. He voluntarily agreed in express words to forego other rights of action that might have accrued to him, in favor of a quick, certain and equitable method of compensation for all injuries, including occupational disease, whether or not attributable to his employer's fault, that arose in the scope of his employment in intrastate business. From the date of the agreement, October 12, 1928, until April 17, 1929, when disabled by his accident, he enjoyed its benefits in the sense that there was available to him or his dependents compensation for injuries received irrespective of fault. The Ohio statute did not compel him or the Railway to enter into such an agreement; it put neither of them to their election; it merely expressed what would otherwise have been implied from the general principles of the common law, that such a contract was wholly legal, and subjected it to the approval of the Ohio Industrial Commission to insure its fairness. This action by the Commission was invoked by plaintiff as well as defendant.

Accurately stated, the questions presented by this aspect of the case are:

May the State of Ohio, by its constitutional provisions and its statutes enacted pursuant thereto, validly authorize

a contract between an employer and an employe, by the terms of which the parties agree, upon adequate consideration and subject to the approval and supervision of the state, to a method of determining the compensation payable upon the contingency of an accident occurring with or without fault in intrastate commerce, and whether the contract becomes inoperative if it is made to appear that the injury in intrastate commerce results from the use of equipment said to be defective or insufficient within the meaning of the Federal Safety Appliance Act?

In the recent case of *Railroad v. Armburg*, 285 U. S. 234, this Court had occasion to declare the extent of state authority in respect of the enactment of a compensation law and its application to a railroad as employer. To the contention of the company that the act although sought to be applied as to an intrastate matter was an interference with interstate commerce, this Court held that the matter of compensation for injuries in intrastate commerce was committed for the sole determination of the several states. We quote from the opinion by Mr. Justice Stone as follows:

> "The enactment of workmen's compensation acts is within the legislative power of the State. *Mountain Timber Co. v. Washington*, 243 U. S. 219, 238, 239; *Madera Sugar Pine Co. v. Industrial Accident Commission*, 262 U. S. 499, 501, 502, * * *."
>
> "*The interstate commerce clause did not withdraw from the States the power to legislate with respect to their local concerns, even though such legislation may indirectly and incidentally affect interstate commerce and persons engaged in it. Sherlock v. Alling*, 93 U. S. 99, 103; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 26; *Interstate Busses Corp. v. Holyoke St. Ry. Co.*, 273 U. S. 45, 52; *Chicago, Milwaukee & St. Paul R. R. Co. v. Solan*, 169 U. S. 133, 137, 138.
>
> Although by the Federal Employers' Liability Act the regulatory power of the National Government over interstate commerce has been extended to the em-

ployes of interstate rail carriers, *it has not excluded the exertion of State power over their employes while engaged in a service not involving interstate commerce.* See *Shanks v. Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 558.

The liability of the carrier to its employes when so engaged *is controlled by state law*; see *Illinois Central R. R. Co. v. Behrens*, 233 U. S. 473; *Wabash R. R. Co. v. Hayes*, 234 U. S. 86, 89, 90; *and thus remains within the scope of the State legislative power to regulate the relations of master and servant. Chicago & Eastern Illinois R. R. Co. v. Industrial Commission of Illinois*, 284 U. S. 296." (Italics ours.)

Conversely, this Court has held that Congress has confined its regulation in this regard (Federal Employers' Liability Act) to cases arising in interstate commerce. *Railroad v. Behrens*, 233 U. S. 473.

If, as the *Arimburg* case clearly establishes, the State of Massachusetts may provide a compensation remedy for employes of a railroad engaged in interstate and intrastate commerce, *where the injury is sustained by the employe in intrastate commerce*, it certainly follows that the State of Ohio, *which does not go so far*, can *authorize* a contract whereby an employe and his employer may voluntarily agree to be governed and controlled by the Ohio Compensation Act in respect of injuries sustained in *intrastate* commerce.

No Act of Congress prohibits such a contract. The Federal Employers' Liability Act, it is true, expressly forbids any contractual modification of the rights to which it gives rise but such act has no application here. The Safety Appliance Act contains no such prohibition. It is confined in its express language to the establishment of a standard of duty. It expressly conferred no right of action and while such right arises by implication (*Railway v. Rigsby*, 241 U. S. 33) it seems quite impossible to go further and

read into the Act itself for the purpose of this case a prohibition against a voluntary contract of the sort here under consideration. On the contrary the very absence of such a provision, in view of an express provision in the Federal Employers' Liability Act, fairly supports our contention that Congress by the Safety Appliance Act not only did not prohibit such a contract but also did not intend so to do. It seems entirely enough to say that the Safety Appliance Act creates a standard of duty and gives a right of action in event of its violation to the damage of another. To put the right of action thus created beyond the power of the holder or potential holder thereof to contract with respect thereto seems to us to go far beyond the words and intent of the statute and to put beyond reach of the employe the right to contract about such right either before or after his cause of action accrued would, of course, in effect make of the persons for whose benefit the statute was passed, wards of the Federal Government, without whose approval or a substitute court action, no contract affecting such right could be valid. To push the matter thus far might be to encounter the provisions of the Fifth Amendment. *Adair v. United States,* 208 U. S. 161; *Atkins v. Hospital,* 261 U. S. 525. We have already pointed out that there is no difference in principle between a contract before the fact and one afterwards, providing the former is supported by good consideration and legal under the law of the state having, as here, jurisdiction to act in the premises, to-wit, the matter of compensation for an injury arising out of intrastate commerce.

We concede that the Safety Appliance Act affords a standard of duty and that its violation creates a right of action in one injured thereby even though he at the time is engaged in intrastate commerce, *Railway v. Rigsby, supra,* but we deny that the statute does more than that or that there is any other statute of Congress that adds to

that result.[1] If this is so, there is no obstruction to the right of plaintiff to contract either in respect of his rights under the Act, either potential or actual, particularly where, as here, he is permitted to do so voluntarily but with the state's approval.

Even a constitutional right may be waived. *Booth Fisheries Co. v. Industrial Commission,* 271 U. S. 208; *Daniels v. Tearney,* 102 U. S. 415; *Grand Rapids etc. Railway Co. v. Osborn,* 193 U. S. 17. This is the rule in Ohio, where "a citizen may waive a constitutional right." *Byers vs. Printing Co.,* 84 O. S. 408, 422, 95 N. E. 917. See also *Tone v. Columbus,* 39 O. S. 281. The rule was applied by the Ohio Supreme Court with respect to the first compensation act, then elective in form. *State ex rel. v. Creamer,* 85 O. S. 349, 97 N. E. 602. The present act is, as heretofore pointed out, elective as concerns this plaintiff and defendant—this because of the provisions of the Act itself. G. C. 1465-98.

This Court has never held that a state may not give express permission to its residents to make express contracts concerning their respective rights and liabilities in the event of injuries occurring in intrastate commerce, even when those injuries have resulted from violation of the Safety Appliance Act.

Indeed, in considering the validity of a compensation act (Texas), where compliance with which was optional with the employer and upon his compliance binding on employe if he stays in the employment after notice of his employer's act, this Court held that such arrangement did not invalidate the law as a denial of equal protection of law, and Mr. Justice Pitney gave it as the opinion of the Court, in *Middleton v. Light Co.,* 249 U. S. 152, that

> "The relation of employer and employee being a voluntary relation, it is well within the power of the State to permit employers to accept or reject the new

[1] Compare *Moore vs. Chesapeake & Ohio Railway,* decided by this Court Feb. 5, 1934.

plan of compensation each for himself as a part of the terms of employment, and in doing so there was no denial to employees of the equal protection of the laws within the meaning of the Fourteenth Amendment."

While the precise point has not been passed upon by this Court, there do exist decisions of this and other courts which, we submit, establish the correctness of the decision below.

A contract reached under the compensation act of one state has, for example, been held enforcible as a limit of obligation or liability even though the accident occurred in another state whose law in respect of the occurrence would otherwise ordinarily control as a measure of obligation. *Bradford Elec. Co. v. Clapper, Admx.*, 286 U. S. 145. This decision, it seems to us, is persuasive in the case at bar in so far as it recognizes and enforces a contract status reached under a compensation act. The defendant here, is, like the petitioner in the *Clapper* case, interposing a right by way of defense to the liability claimed by the plaintiff—a right which, we submit, accrued under a statute which, as there, left no room for construction. It is true that the *Clapper* case involved considerations other than here appear which prompted the enforcement of the Vermont law, but on principle it is difficult to see that the right asserted by plaintiff under the Safety Appliance Act occupies any more substantial position than the right claimed by Clapper's administrator to the benefit of the New Hampshire law.

We turn now to decisions in another situation which is analogous, *i.e.*, those involving admiralty jurisdiction. The result in these cases support our position, particularly as it is to be remembered that under Art. III, Sec. 2 of the Constitution, the United States is given exclusive jurisdiction of admiralty and maritime matters, while in

cases involving, as here, matters relating to commerce the Federal jurisdiction is founded on interstate commerce, the state possessing under its reserved power jurisdiction over commerce within its borders. In admiralty matters, while the states have been given some field of action it has been only on the ground that the action thus exerted did not materially invade the Federal power. See *Grant, etc. Ship Co. v. Rohde*, 257 U. S. 469; *Millers, etc. Co. v. Braud*, 270 U. S. 59, 64; *Smith & Sons v. Taylor*, 276 U. S. 179. It has long been recognized that the states otherwise had no jurisdiction in such premises, particularly where compensation law *as law* was sought to be applied. *Employers Liability Corp. Ltd. v. Cook*, 281 U. S. 233; *Baizley Iron Works v. Span*, 281 U. S. 222, and *Southern Pacific v. Jensen*, 244 U. S. 205. Putting aside for the moment reasons why those authorities relied upon by plaintiff are inapplicable here, in the following cases it is indicated that a voluntary contract would be enforced even in face of this state of the law. *Northern Coal Co. v. Strand*, 278 U. S. 142.

Here plaintiff's decedent was a stevedore and killed during the unloading of a vessel at a dock, and therefore, in maritime employment. The question involved the Wisconsin Compensation Law, the remedies of which Strand's widow sought to invoke. The Wisconsin Act contained provisions in the nature of presumptions of compliance upon certain conditions. This Court held the Compensation Law inapplicable under those circumstances but the majority opinion, written by Mr. Justice McReynolds, intimated and the special concurrences of Justices Stone, Holmes and Brandeis stated that an *actual* agreement between the parties to be bound by the provisions of the state law would be valid even as to a maritime injury otherwise beyond the jurisdiction of the state law. Mr. Justice McReynolds (page 145) found—

"nothing in the record to indicate that when contracting with its stevedores the Dock Company *actually agreed* to subject itself to the liabilities imposed by the State Compensation Act."

And Mr. Justice Stone, with whom Justices Holmes and Brandeis concurred, said in part, pages 148-149:

> "The state act here is contractual, as we have held in *Booth Fisheries Co. v. Industrial Commission*, 271 U. S. 208, and the employer *is bound* to pay a compensation in accordance with the schedules of the act *because the parties have agreed that they shall apply rather than the common or any other applicable law.* * * *. To me it would seem that the rights of parties who have thus stipulated for the benefits of a state statute in an essentially maritime employment are not on any theory controlled by the maritime law or within the purview of *Southern Pacific Company v. Jensen*, 244 U. S. 205; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149; *Washington v. Dawson & Co.*, 264 U. S. 219. * * * *Recovery in a state court upon an insurance policy* upon the life of a seaman for death occurring on a ship on the high seas while in the performance of his duties *would not, I suppose, be deemed to have that effect or be precluded by the admiralty law even though some of the provisions of the policy were imposed by state statute.*"

The Supreme Court of Maine in *Berry v. Donovan*, 120 Maine 457, 115 Atl. 250, considered the question the existence of which was suggested in the *Strand* case, *supra*. Here Berry, a longshoreman, was injured while engaged in the operation of unloading a vessel moored to a Portland dock. Plaintiff at the time of the accident was on the platform on the dock, to which platform the cargo was being unloaded from the vessel by a traveling derrick. Berry was injured when he was struck by the sling of the derrick. He made application for compensation under the Maine law. His employer resisted the application on the ground that the Maine law if thus applied was invalid in

view of the admiralty jurisdiction of the United States. The Maine Act was optional or elective. It required the express assent of the employer and the approval of the Commission. The employe assents unless he gives notice to the contrary. The Court found the contract existed and enforced it.

We quote for convenience as follows (Reporter, p. 253):

> "His [employe's] attitude is that he and his employer, enjoying constitutional freedom to contract, voluntarily put aside rights and obligations otherwise vouchsafed them, and therefore substituted the new form of compensating industrial injuries which the Legislature of their state has provided. Having done this and injury having befallen the plaintiff out of and in the course of his employment, he insists that this court make their contract to square with the demands of real justice and plain common sense, that his rights in the dual citizenship of state and Union may not be unjustly infringed, and that the remedial legislation out of which the contract sprang may be judged by what it achieves in satisfying the righteous demand of society for a justice that is exact, equal and full."

And again, page 254:

> "No reason is perceived why it would not be quite as competent for them to fix upon a mode for determining when, where, and the extent to which money relief or compensation should be forthcoming in the event of accident, as it would be for them, after the happening of an accident, amicably to make adjustment of damages or to submit the question to the determination of a common-law arbitration, or for the injured one to waive his right to damages, or for the other to make him an award therefor—no legal liability existing. * * *. Employer and employe mutually substitute for rights and liabilities which the law would imply from the contract of hiring other rights and liabilities *made effective by a state-sanctioned contract*

> *of their own making*, entered into to remove the uncertainties of possible lawsuits. * * *. In this rigorous climate, where the winds of common sense blow free and strong, that contract seems anchored secure within a safe legal haven.
>
> * * * Under a compulsory statute, the rights and liabilities of parties arbitrarily arise from the law. *Under an elective statute they come into existence from contract.* * * *. The Legislature of the State of Maine has not presumed to encroach or trench upon a power which the people of the United States conferred upon the nation. *The Legislature has confined itself to the enactment of a law intended to operate only in those instances where its provisions are voluntarily contractually adopted*, and operative solely by the procedure of the statute on which the adoption is bottomed. *A contract founded on that law is of right entitled to the rights of a contract universally.*"

The same rule is established in Oregon (*West v. Kozer*, 104 Ore. 94; 206 Pac. 542). In this case the Supreme Court of Oregon considers that this Court held as much in *Grant etc. Ship Co. v. Rohde*, 257 U. S. 469, saying:

> "It will be observed that the last paragraph in the opinion practically concedes, that, but for the fact that the parties had elected to come under the provisions of the Compensation Act, the jurisdiction in admiralty would have existed, which is what the petitioners contend here."

Rickert v. Commission, 122 Ore. 565, 259 Pac. 205; *Shea v. Commission*, 118 Ore. 642, 247 Pac. 770. In these cases, while it is pointed out that decisions of this Court have permitted the states a field of action when the general purposes of the admiralty law are not involved, the voluntary acceptance under the particular compensation act has been enforced in matters clearly maritime. See also *Millers, etc. Co. v. Boudreaux*, 261 S. W. 137, affirmed 270 U. S. 59; *Travelers Ins. Co. v. Bacon*, 30 Georgia App. 728, 119 S. E. 458.

In *Jordan v. Leylund & Co., Inc.*, 7 Fed. (2nd) 386, (D. C. Louisiana) the Court, in passing on the effect of the maritime jurisdiction of the United States as it related to the provisions of the Louisiana Compensation Law, holds in effect that a specific contract between employer and employe entered into before the accident, adopting the state law as the measure of their respective rights, would govern, to the exclusion of the remedy of the maritime law, and that such conclusion was not in conflict with *Southern Pacific Co. v. Jensen, supra*, and *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, both of which are relied upon by plaintiff.

We turn now to the authorities upon which petitioner relies. In this connection we submit that what has gone before has served to establish (a) that the contract or agreement between the parties here was a voluntary one, entered into without any compulsion either so far as the state law is concerned or as between the parties themselves; and (b) that the voluntary contract, having the sanction of the state, is in all respects fair and supported by adequate consideration.

To give effect to such contract according to its terms conflicts with none of the decisions that petitioner cites. Pages 8 to 26 of petitioner's brief are devoted to establishing that "causes of action accruing to railroad employes are not subject to state systems of compensation." But this does not reach the point of the instant case. The Ohio law does not purport to regulate or define the duty of the defendant with respect to the condition of the couplers on its cars nor does it attempt expressly or by implication to modify, regulate, disturb or defeat the cause of action arising by non-compliance with that Act. It contains no compulsion of law *as law* which tends to interfere with the enforcement of the Safety Appliance Act. It does no more than permit the employe, while engaged in work of which

the state has jurisdiction, to contract with reference to any right he may enjoy under favor of the Safety Appliance or any other Act and thereby receive other equivalent benefits the existence of which has been judicially recognized by this and other courts, including those of Ohio.

Texas & Pacific Railway v. Rigsby, 241 U. S. 33, decided that an employe whose injury was occasioned by a defective grab-iron while he was engaged in an intrastate movement had a right of action under the Safety Appliance Act. The Court held that in this respect interstate and intrastate commerce were so intimately blended that Congress might regulate both. Although no conflicting state law was involved, Mr. Justice Pitney, arguendo, used the language quoted at page 9 of the petitioner's brief, and indicated that state law might not interfere with such regulation. He spoke only of the inability of a state to enforce an inconsistent law as law. No syllable of his opinion casts doubt on its right to let the parties contract as they choose.

Ross v. Schooley, 257 Fed. 290 (C. C. A. 7), is an illustration of the principle expressed by the dictum of Mr. Justice Pitney in the *Rigsby* case. The employe was hurt by a defective coupler while engaged in intrastate commerce. The parties had made no agreement as to their rights and the court held that, as between the conflicting laws the Federal Act controlled. Again the issue was the compulsion of the law as such, and not the right of the parties to agree on methods of compensation.

In *Ward v. Erie Railroad Co.*, 230 N. Y. 230, 129 N. E. 886, Mr. Justice Cardozo, whose language is quoted at page 13 of the petitioner's brief, was dealing again with the claim that the New York Compensation Act of its own force superseded the Federal law. That the Safety Appliance Act does not depend for its efficacy on the pleasure of the state is undoubted, but that proposition does not forbid the parties to agree as to their rights.

In *Director General of Railroads v. Ronald*, 265 Fed. 138 (C. C. A. 2), the court was considering the right of action possessed by a railroad employe, whose injury from a violation of the Federal Safety Appliance Act occurred while he was engaged, as a majority of the court held, in interstate commerce. The New York Compensation Act contained a clause much like that of the Ohio Act, providing that the act should apply in intrastate commerce only in so far as accepted by both parties. But, as has been seen, (a) a majority of the court thought that interstate commerce only was involved; (b) it nowhere appears that the parties in fact contracted that the New York Act should govern; and (c) when the case was argued in the Federal Courts there was not, as here, a decision of the State Courts applying such contracts to cases under the Safety Appliance Act. The dicta of Judge Manton (concurring opinion) quoted by the petitioner at page 26 therefore resolve themselves into the conclusion that as a matter of statutory construction the New York law is inapplicable to intrastate transactions involving the Safety Appliance Act—a conclusion that is irrelevant here, in the face of the binding construction given to the Ohio contract by the Ohio courts.

We also call attention to the fact that while, according to Judge Manton's opinion (page 144), the New York Compensation Act contained a provision quite similar to the Ohio provision (G. C. 1465-98) (extending permissive right of agreement), Judge Manton gives in effect as one of the reasons for the non-application of the New York Act the fact that the parties in that case had not acted under the permissive power contained in the section.

New York Central Railroad Company v. Winfield, 244 U. S. 147, is of course inapplicable here, because it only decided that, as to injuries occurring in interstate commerce, New York might not superimpose liability for non-

negligent injuries upon the liability for negligent injuries resulting from the Federal Employers' Liability Act.

Southern Railway v. United States, 222 U. S. 20, *Southern Railway v. Commission*, 236 U. S. 439, do nothing more than establish that which is unquestioned here, that Congress could validly regulate the matter of safety appliances and having done so the regulation is exclusive in so far as concerns the power of the state to interfere in respect of the subject-matter of the law. *Houston etc. Railway Co. v. United States*, 234 U. S. 342; *Railroad v. Interstate Commerce Commission*, 221 U. S. 612; *Second Employers Liability Cases*, 223 U. S. 1; *Charleston, etc. Railway v. Furniture Co.*, 237 U. S. 597; *Napier v. Railway Co.*, 272 U. S. 605; *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59, are examples of the well established rule that within the field of which it possesses power such as matters relating to liability of railroads to employes in interstate commerce and the regulation of rates in interstate commerce, laws enacted by Congress are entitled to exclusive effect as against attempted state regulation in that regard.[1]

No decision of state courts cited in petitioner's brief, pages 14, 15 and 16, affects the question here. In none of those cases, so far as we can find, was any express voluntary contract involved, whether the state compensation act was compulsory or elective. It is, of course, clear that merely because an act is elective in the sense that an employer may or may not *comply* with its terms does not mean the existence of an actual voluntary contract between the complying employer and his employe. As will be later seen, a compensation act may make no provision for such a contract. Most of them do not. Some attempt to impose

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[1] Even where federal regulation has existed with reference to the same subject matter this Court has held state laws enforcible. Numerous instances are listed in Appendix B hereof.

or declare a contract between the parties by a presumption on action or non-action after notice, but this is not here the fact.

Petitioner's second proposition (pp. 26 to 36 of petitioner's brief) is addressed to establishing that—

> "the states are without power to put the parties to an election such as was exacted in the instant case."

Enough has been said to demonstrate, we submit, that the assumed premise of such argument, to-wit, that the State of Ohio put the plaintiff and defendant here to an election, does not in fact exist. In other words, no agreement or election was here "exacted," nor does the Ohio Act provide for such exaction or contain within its terms any compulsion as far as the parties are concerned. The section in question (1465-98) demonstrates this and, as heretofore pointed out, it has been thus judicially construed. *Hogan v. Railroad*, 15 Fed. (2nd) 739; *Connole v. Railroad Co.*, 216 Fed. 823; *State ex rel. v. Industrial Commission*, 100 O. S. 500, 127 N. E. 595. The authorities cited by the plaintiff, *Director General v. Ronald*, *Railway v. Winfield*, and *New York Central Railroad v. Winfield*, having to do with the application of compensation laws in respect of regulation by Congress of liability in interstate commerce, do not, obviously, touch the question here presented. Petitioner points, however, to decisions of this and other courts on the question of the application of workmen's compensation acts as such to the field of admiralty jurisdiction and cites authorities, of which *Employers Liability Cases, Ltd. v. Cook*, *Baizley Iron Works v. Span*, *Southern Pacific Co. v. Jensen*, *Knickerbocker Ice Co. v. Stewart* are examples. But these decisions do not help the petitioner's case. The "elective" state compensation acts there in question that were not permitted to apply to maritime or other transactions to which a compulsory act could not apply, have with-

out exception provided that the parties should be bound by them, in the absence of an expressed dissent. In other words the State makes or attempts to make the contract for and between the parties. An act drawn in this form can be said not to rely upon contract in the same sense as the Ohio Act. A state may imply a contract from the silence of the parties only in so far as it could have bound them directly by compulsory act. *Erie Railroad v. Winfield*, 244 U. S. 170. As regards the extent of the operation permitted, therefore, "elective" compensation acts of this type do not differ from compulsory acts. No inference can be drawn, therefore, concerning the scope which will be allowed to an actual contract between the parties from the decisions imposing limitations upon elective acts of this sort.

In *Baizley Iron Works v. Span*, 281 U. S. 222, a case involving a maritime tort, "the Pennsylvania statute declares that there shall be a conclusive presumption that both employer and employee accept its provisions unless one of them makes a written statement to the contrary."

The petitioner relies particularly on *Employers' Liability Co. v. Cook*, 281 U. S. 233, a maritime case involving the extent of the operation of the Texas Compensation Act. Under the Texas Act it appears from *Miller's Indemnity Underwriters v. Braud*, 270 U. S. 59, that employes are presumed to accept the plan of compensation unless they give written notice to the contrary.[1] This we assume to be the

[1] The portion of the Texas statute in question (Art. 8306, Sec. 3-a) is as follows:

"An employee of a subscriber shall be held to have waived his right of action at common law or under any statute of this state to recover damages for injuries sustained in the course of his employment if he shall not have given to his employer, at the time of his contract of hire, notice in writing that he claimed said right * * *."

basis of the statement in petitioner's brief (p. 28) that "both had elected" within the meaning of the local law. There was obviously no actual contract and in fact the Texas Act, so far as we can find, makes no provision for an "actual voluntary contract" and it follows that the election of which Mr. Justice McReynolds spoke in the *Cook* case was, again, therefore, implied rather than expressed, and, as in the *Winfield* case, could for that reason reach only those things about which the state might legislate directly. The same reasoning applies to the decision of the Texas Court of Civil Appeals in *Bell v. Southern Casualty Company*, 267 S. W. 531, in which, there being no actual contract, the Texas Act was held not to apply to a maritime tort.

Southern Pacific v. Jensen, 244 U. S. 205, is referred to as establishing that the provisions of the New York Compensation Act could not be validly applicable to an employe engaged in maritime work and it is pointed out that the New York law contained a provision identical with G. C. 1465-98. Several considerations preclude either the decision or result in the *Jensen* case applying here. In the first place the scope of the *Jensen* decision is to be considered in the light of more recent decisions of this Court with respect to the application of workmen's compensation acts to matters which would otherwise concern admiralty jurisdiction. We have already considered several of these decisions but point to *Grant, etc. Ship Co. v. Rohde*, 257 U. S. 649, as an example. In the second place, Jensen, unlike Gilvary, was engaged in work of a maritime nature exclusively within the jurisdiction of Federal power. In other words, it would be as if Gilvary in the instant case had been engaged in interstate commerce, in which event, of course, the case would not be here as neither the Ohio statute nor the contract would apply. In the third place, while the New York Act did contain a provision similar to G. C. 1465-

98, there is nothing in the findings of fact in the *Jensen* case that either Jensen or his employer had expressly contracted with each other under favor of that or any other section. In fact, in so far as maritime work is concerned, the similar section of the New York Act contains no authority for a voluntary contract between employer and employe engaged in maritime work but the authorization given by the section is, of course, limited to engagements in interstate commerce, presumably by rail. This consideration disposes of the cases of *State ex rel. v. Duffy*, 113 O. S. 96, 148 N. E. 572, and 113 O. S. 579, 149 N. E. 570, cited by petitioner.

In the second report of *State ex rel. v. Duffy*, 113 O. S. 579, 149 N. E. 570, the Supreme Court of Ohio determined nothing more than that the employe there was engaged in maritime work and that the Ohio Compensation Act had no application—a conclusion undoubtedly correct, particularly in view of the fact that the Ohio Act contains with respect to maritime matters no such provision as G. C. Sec. 1465-98, dealing with the matters of *inter-* and *intrastate commerce*.

The cases of *Knickerbocker Ice Co. v. Stewart*, *supra*, and *Duart v. Simons*, 231 Mass. 313, 121 N. E. 10, are not to the contrary. Indeed the decisions of this Court in *Southern Pacific v. Jensen* and the *Knickerbocker Ice Company* cases have been otherwise interpreted by the Supreme Court of Oregon in *West v. Kozer*, 104 Ore. 94, 206 Pac. 542, *supra*, and we quote on page 543 (Reporter):

> "We do not understand the court as holding that an employer and an employee may not, as between themselves, contract to take out a form of accident insurance which shall be the measure of the liability of the employer in case of accident, and preclude the necessity of litigation in the federal courts, which is the case here presented. The method is a beneficent one,

> insuring to every employee a certain remedy and fair compensation instead of difficult litigation, a doubtful remedy and in many cases resulting in no compensation."

And again (p. 544):

> "It is not the policy of the law, international or otherwise, to pull parties into court by the hair when they have agreed between themselves upon a method of keeping out, and, in view of the decision last quoted, this ought to terminate the present controversy in favor of the petitioners."

Petitioner (p. 28) cites *Mountain Timber Co. v. Washingtpn*, 243 U. S. 219; *Hawkins v. Bleakley*, 243 U. S. 210 and *New York Central v. White*, 243 U. S. 188, as establishing that the state systems of compensation are valid, whether voluntary or compulsory and that, therefore, it is immaterial whether the "supposed contract is express or implied or whether the relationship arises out of action or non-action or is the result of a conclusive presumption." This proposition ignores several material considerations. One is that merely because the state has the right to enact either sort of compensation law it does not follow that the effects of the two are identical. The other is that the word "elective" as applied to a particular compensation act normally describes a system which, wholly unlike the Ohio law (G. C. 1465-98), leaves it optional with the employer to operate under the particular act and then presumes consent in absence of a dissent by the employe. In other words, at the risk of repetition, we point out (a) a lack of any compulsion under the Ohio law; (b) a lack of any provision in the Ohio law drawing within its terms an employer and employe without their respective conscious and written assents; and (c) the provision in the Ohio law for an affirmative voluntary act on the part of each party, is in turn subject to the approval of the state. It is to state the ob-

vious to say that there is a wide difference between the enforcement of a state law as law and the enforcement of a voluntary agreement permitted by a state law and limited to a subject-matter over which the state has jurisdiction. *Railroad v. Armburg, supra.* Even under the *Jensen* case read in the light of the subsequent decisions of this Court, for example, *Grant, etc. Ship Co. v. Rohde, supra,* and *Western Fuel Co. v. Garcia,* 257 U. S. 233, it is open to suggest by way of analogy that within the principle of "local concern," where, as here, the case involves intrastate commerce, a permissive agreement does not, although inclusive of a right (actual or potential) under a Federal Act, work any material prejudice to Federal law, *i.e.*, the Safety Appliance Act, particularly where such a contract in effect recognizes the Federal right by providing the employe who thus voluntarily contracts, with a substantial consideration for the surrender of such a right. In so far as the decisions of this Court upholding an express contract, where admiralty matters are involved, we have already referred to *Northern Coal Co. v. Strand,* 279 U. S. 142.

We now turn to—

3—The question of estoppel.

Here, we suggest that if the provisions of the Ohio Compensation Act here involved may be said to be invalid because as construed by the Supreme Court of the State they preclude rights accruing by reason of the enactment of the Federal Safety Appliance Act, the plaintiff nevertheless by his voluntary contract and consequent operation, so to speak, under the Act is estopped, under the circumstances, from asserting such invalidity. It seems quite clear that the section of the Ohio law (G. C. 1465-98) is permissive only and that its invalidity would not affect the

contract. *Shepard v. Barron*, 194 U. S. 553, 566. Otherwise stated, the fact that the plaintiff's and defendant's action here was as between themselves voluntary, would serve to insulate the contract from any defect in the permissive statute, the validity of which is immaterial, the parties having acted thereunder.

As a contract standing alone and disassociated from the statute, it is we submit entirely valid. It may not be said that such a contract is invalid from any standpoint of public policy of the state. On the contrary, it is pursuant to the public policy of the State of Ohio, as expressed in the provisions of its Constitution (Art. II, Sec. 35, elsewhere referred to herein), and which provisions must be considered valid at least for the purpose of expressing such a policy. Further, as hereinabove pointed out, no act of Congress prohibits such a contract.

Under these considerations the case is within the rule of *Booth Fisheries Co. v. Industrial Commission*, 271 U. S. 208.

Here, where the Wisconsin Compensation Act was elective, the employer, the Fisheries Company, elected to operate under the Act and later with respect to a claim made against it under that Act attempted to assert that the law was unconstitutional. After pointing out that the Act was elective and that a non-participation in the Act would leave the employer fully protected in so far as the constitutional objection which it was then asserting was concerned, the Court, through Chief Justice Taft, said (p. 211):

> "More than this, the employer having *elected to accept the provisions of the law, and such benefits and immunities as it gives, may not escape its burdens by asserting that it is unconstitutional. The election is a waiver and estops such complaint. Daniels v. Tearney*, 102 U. S. 415, *Grand Rapids & I. R. Co. v. Osborn*, 193 U. S. 17."

As was said by Mr. Justice Peckham in *Shepard v. Barron, supra* (p. 568):

> "Certainly when action of this nature has been induced at the request and upon the instigation of an individual, he ought not to be thereafter permitted, upon general principles of justice and equity, to claim that the action which he has himself instigated and asked for, and which has been taken upon the faith of his request, should be held invalid. * * *."

This principle is the rule in Ohio. See *Tone v. Columbus*, 39 O. S. 281; *Stage v. Cleveland*, 94 O. S. 377, 114 N. E. 261; *State ex rel. v. Turner*, 93 O. S. 379, 113 N. E. 327. "A citizen may waive a constitutional right." *Byers v. Printing Co.*, 84 O. S. 408, 422, 95 N. E. 917. See also *State ex rel. v. Creamer*, 85 O. S. 349, 97 N. E. 602, *supra*.

> "The provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up." *Shepard v. Barron, supra*.

Like the employer in the *Booth Fisheries* case, *supra*, Gilvary expressly agreed with the company, with the approval of the Industrial Commission, that the respective rights and liabilities of himself and employer

> "shall be governed by the provisions of the Workmen's Compensation Law of Ohio in all cases in which such injury * * * is sustained while * * * engaged in *intra*-state commerce."

and also requested—

> "the Industrial Commission of Ohio to approve"

his election to operate under the Act. The Commission did so. More than that the company paid its premiums based upon his election (defendant's exhibit 2). He had

"operated" under such election for the eight months during which he was employed prior to the accident. During that time he was not only protected in respect of injury sustained in the course of his work caused by negligence but injuries from any other cause unless self-inflicted (G. C. 1465-68), and also from the effects of *an occupational disease* (G. C. 1465-68a, *et seq.*), and in addition thereto his dependents were likewise protected in the event of his death in the course of his employment from whatever cause (other than self-inflicted) and including death due to occupational disease.

Gilvary was an experienced railroad employe, having been so employed for twenty-three years prior to his accident. (R. 42.) He was familiar, in fact is presumed to be familiar with laws such as the Safety Appliance Act, enacted in 1893. His voluntary and studied election under the compensation act was not only a two-party agreement between himself and employer but at his request the State of Ohio, through its Commission, approved his election and thereby in effect became a party, *West vs. Kozer, supra*, and thus made available to him, in the event of injury or death, (1) the compensation fund of the state, or its equivalent security, and (2) the power of the state to compel and secure to him the remedies and benefits which the state law gave him upon his election. The awards made by the commission are preferred and put on a parity with taxes. (G. C. 1465-77.) The commission has the widest powers. It has jurisdiction to hear and determine all questions within its jurisdiction and its decision is final except for the right of *employe* to appeal. (G. C. 1465-90.) It may compel the attendance of witnesses and the Attorney General of the state is its counsel to enforce its orders in the courts.

A party may not procure action by a state commission under state statute and then assail such action on the theory that the statute under which it was taken is invalid. *United*

Kuel Gas Co. v. Railroad Commission, 278 U. S. 300, 307. An election, as provided under state law, bars a litigant who availed himself of the power conferred from denying the validity of the law. *Electric Co. v. Dow*, 166 U. S. 489. See also *Eustis v. Bolles*, 150 U. S. 361; *St. Louis v. Prendergast Co.*, 260 U. S. 469.

We see no difference between the position of Gilvary and that of the parties occupying a similar status in the *Booth Fisheries* and *United Gas* cases, *supra*—each acted under or elected to accept the law. The fact that here the employe made the election rather than the employer is no ground for the non-application of the principle there established, *i.e.*, of waiver and estoppel. Under the decisions of this and the Ohio Supreme Court, *supra*, the invalidity of of the entire Workmen's Compensation Act could not affect this contract. The company could not avoid its obligations, which from the standpoint of the law of contract would be enforceable according to the standards of the Act. Even the State of Ohio having approved the contract and therefore a party to it would be estopped to dispute its validity or that of G. C. 1465-98 authorizing it. *State ex rel. v. Turner*, 93 O. S. 379, 113 N. E. 327.

The judgment below did not deprive Gilvary of his right to compensation, including a possible fifty per cent increase should the Commission find the injury proximately caused by a defective coupler. (Ohio Consti. Art. 11 Sec. 35 and G. C. 8950.) In this connection the record shows statement of counsel (R. 25) that the Company has at all times been ready to perform its part of the contract. The two year limitation G. C. 1475-72 does not apply. Even an oral claim against an employer who as here pays direct is sufficient. *Tyler Co. vs. Rebic*, 118 O. S. 522, 161 N. E. 790. Notice of an accident is required to be reported within a week. (G. C. 1465-99.)

B—The defendant otherwise was entitled to a directed verdict in its favor because (1) the finding of the jury that there existed any defect in the coupler or couplers (the sole basis of the plaintiff's case) is not supported by the requisite degree of proof; and (2) the couplers, even if defective, constituted a condition as distinguished from the proximate cause of the accident, which if proximately due to acts (even if negligent) of plaintiff's co-employes are compensable only according to the agreement.

1. The finding of the jury is not supported by the requisite degree of proof.

The verdict, it will be observed, rests *solely* upon the admitted fact that the cars did not couple. The plaintiff, although the couplers were immediately before him prior to the accident, does not undertake to say or claim that there was anything broken or defective about them. In fact he testifies that he could see nothing wrong with either coupler. We quote as follows:

> "Q. So that you stood within two feet and a half of that car, charged with the duty of ascertaining whether the thing was open and to the extent that you looked at it you couldn't see that anything was wrong or broken about it, could you? A. No, sir." (Referring to the Pee McKee car, Rec. 66.)

Again:

> "Q. Now you had looked at the Baltimore and Ohio coupler before you gave the swing-down signal, hadn't you—I mean the steady signal? A. Yes.
>
> Q. You were the man that was in charge of the coupling operation? A. Yes, sir.
>
> Q. And you were therefore the man who was in control so far as signals were concerned? A. Yes, sir.
>
> Q. And you could have stopped that cut at any time it came down there, couldn't you? A. Yes, sir." (Rec. 70.)

* * * * *

"Q. And how far was the Baltimore and Ohio car from the knuckle when those cars stopped? A. Two or three feet."

And again:

"Q. And what do you say to this jury in opening that thing, whether you could see anything broken or defective about that coupler? A. Could not.

Q. All right. And therefore did not, I suppose? I assume, is that right? A. I said, could not.

Q. All right, now you have that open and then what did you do? A. Looked all right, looked to be in line to me and I signalled the engineer to back up." (Rec. 73.)

And again:

"Q. Yes, but to the extent that that object as it came down toward you, slowly, with the coupler closed, to the extent that you observed it, you coudn't see anything wrong with the Baltimore and Ohio coupler, could you? A. No, sir." (Rec. 78.)

We concede that apart from questions of proximate cause, the failure of a coupler to operate constitutes a prima facie case of defect but this is *only a prima facie case* and we submit that upon this record, in view of the fact (1) that the coupling was attempted upon a curve and a grade; (2) the most rigid inspection immediately after the accident disclosed no defect; (3) the actual coupling of the cars after a necessary adjustment of the draw-bars had been made after the accident; (4) the running test which occured the next day; (5) the photographic exhibits; and (6) the uncontradicted evidence of three experienced railroad men that the failure of the cars to couple, in view of the curve, was no indication that the couplers were defective—it follows that the weight of such evidence on behalf of the defendant not only equalized but overcame the prima facie case made by the failure of the couplers to operate and that in the absence of any evidence by way of rebuttal going to

the weight of the defendant's case the verdict is not supported by the evidence. We submit that this is particularly so because from a standpoint of fact the decisions of the Federal courts recognize the fact that the failure of a safety appliance to work may, under certain circumstances, occur without the Safety Appliance Act having been violated. *Railroad v. Parker*, 242 U. S. 56; *Railway v. Jones*, 300 Fed. 525; *Railway v. Arrington*, 126 Va. 194, 101 S. E. 415, certiorari denied 255 U. S. 573.

Our claim in this regard becomes all the more substantial in view of the fact that where the issue involves proof of a violation of a Federal Act, the standard of such proof is *that required under Federal law*. In other words, if the rights and obligations of the plaintiff depend on the Federal Safety Appliance Act, the kind or amount of evidence required to establish in fact a violation of this act is not subject to control of the several states. *Railway Co. v. Coogan, Admx.*, 271 U. S. 472, Syl. 1; *Railroad v. Aeby*, 275 U. S. 426. These cases establish the following rule,—and we quote as follows from the opinion in the *Coogan* case, *supra*,—

> "The kind or amount of evidence necessary to establish it is not subject to the control of the several States. This court will examine the record, and if it is found that as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed."

and again:

> "* * * It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury *reasonably* may draw therefrom would be insufficient to support a different finding."

Under the Federal rule the scintilla rule not only does not apply but has been expressly condemned. *Small Co. v.*

Lamborn, 267 U. S. 248. The rule is otherwise stated that where—

> "* * * the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict if returned would have to be set aside, the court may and should direct a verdict for the other party." *Slocum v. Life Insurance Company*, 228 U. S. 364, 369.

See also *Railway v. Martin*, 283 U. S. 209.

Tested by the standard of this rule, we submit that the verdict is clearly not sustained by the evidence and the court should have directed a verdict for the defendant.

2. The couplers, if defective, constituted a condition as distinguished from the proximate cause of the accident.

Plaintiff's case is summed up by the following question put and answer given on cross examination (Rec. 76):

> "Q. So that the cause of your accident was, when you had your hand in there, the engineer disregarding the signal you had given him and disregarding his acceptance signal, you say moved that train back?
>
> A. Yes, sir.
>
> Q. And caught your arm?
>
> A. Yes, sir."

The Court will remember that the claim of the plaintiff was that there were two unsuccessful attempts at couplings; that he thereupon blocked the most southerly (the P. McK. & Y.) car and being unable to open a knuckle of the lever he "swung the engineer down" (which signal was accepted by the engineer) and that thereafter he (Gilvary) went in between the cars and that *thereafter* the train was moved back. If this story is true—and it was believed by the jury and was, therefore, the basis for the

verdict—the proximate cause of the accident was as a matter of law the negligence of the engineer, and the condition of the couplers, if defective, was under the authorities hereinafter referred to, a condition and not the cause of the accident. Obviously the negligence of the engineer—in view of (a) withdrawal from the petition of any claims in that regard and (b) the fact that for an accident thereby caused the Workmen's Compensation Act would under the contract apply—cannot be the basis of recovery in this action. The trial court, as requested by the defendant, instructed the jury (Rec. 184):

> "I instruct you that before the plaintiff is entitled to recover * * * he must not only establish * * * that one or both of these couplers was defective or insufficient but he must further establish that the proximate cause of his accident, as I shall define 'proximate cause', was a defective or insufficient condition in one or both of these couplers. Hence if you find that the proximate cause of this accident, as I shall define that term to you, was the movement of this train, whether by the engineer without a signal from the plaintiff or otherwise, your verdict will be in favor of the Railway Company, even if you find by the greater weight of the evidence that one or both of these couplers were defective or insufficient."

The following authorities establish the correctness of this charge:

McCalmont v. Railroad, 273 Fed. 231, affirmed 283 Fed. 736, certiorari denied 260 U. S. 751;
Railway v. Wiles, 240 U. S. 444;
Lang v. Railroad, 255 U. S. 455.

We quote from the last named case:

> "Failure of a railroad to equip a car with automatic couplers, as required by the Safety Appliance Act, will not render it liable to an employe for an injury of which the delinquency was not the proximate cause."

Obviously on the testimony of the plaintiff, on which this verdict rests, the proximate cause of his injury was the negligence of the engineer, for which there is no liability in this case. The failure of the couplers to operate was on plaintiff's testimony no more than a *condition*—but not the cause—of the accident and under these decisions may no more be considered a cause of Gilvary's injury than the fact that he was then and there employed by the Company.

C—The court's charge to the jury.

Our point here concerns the charge of the Court as it involved the closely contested issue with respect to whether or not the couplers, or either of them, were defective. As heretofore pointed out, the case of the plaintiff (if there was a case for the jury) rested solely on the failure of the couplers to work (and this under either theory *i.e.*, whether the accident occurred after the first failure to couple, as testified to by defendant's witnesses, or after the second attempt, as testified to by the plaintiff). In other words, plaintiff's case rests upon the inference arising from what we concede to be a prima facie case made in his behalf on the failure of the couplers to operate. As hereinbefore set forth, the plaintiff does not testify to any observed defect in the couplers and he is his only witness in this regard. The evidence on behalf of the defendant, both with respect to the condition of the couplers (including their operative condition) immediately after the accident, the photographs and the test made the next day, coupled with the testimony of experts with respect to the curve, tended to establish (1) that the couplers as such were in proper condition and (2) that any operative failure was due to (a) the curve in the track and (b) the failure of the plaintiff himself to adjust the draw-bars to accommodate the couplers to the curve. The trial court held that the

question was one for the jury. Any question for the jury could have only been made by reason of the prima facie effect given by failure to operate as against the affirmative evidence of the defendant, including the fact of the curve as excusing such failure to operate without adjustment of the draw-bars. The jury question was thus upon a very narrow issue and required, we submit, a careful and correct instruction to the jury as to the law. This the defendant did not get.

Defendant requested before argument certain instructions to the jury. Under Ohio practice, if either party requests an instruction before argument the giving thereof, if a correct statement of the law, is mandatory. (G. C. 11447 §5.) Obviously if the charge as given is later modified by any instruction in the general charge or otherwise it is impossible to say that the jury was properly advised of the law of the case.

Three things contributed to the verdict in this case. In the first place, the Court refused after having given part of the law (Defendant's Request No. 6) to complete the correct statement by giving Defendant's Request No. 7. In the second place, in its general charge to the jury (hereinafter quoted) it modified the instruction which it gave before argument. (Defendant's Request No. 6.) In the third place, it impliedly approved, by permitting over defendant's objection, plaintiff's counsel in his argument to the jury as to a court decision, a rule of law entirely inapplicable to the case on the facts and which rule of law foreclosed the defendant upon the defense which it was attempting to make, to-wit, that admitting the prima facie case in favor of the plaintiff arising by reason of the failure of the couplers to work, nevertheless the circumstances, to-wit, the presence of the curve and the failure of the plaintiff to adjust the draw-bars, excused in law such failure.

In support of this claim we quote the record.

The defendant requested, and the Court instructed the jury before argument as follows (No. 6):

"I say to you as a matter of law that the fact that these Baltimore & Ohio and P. McK. & Y. cars failed to couple does not necessarily establish that either or both of the couplers were defective, and you must consider all of the surrounding circumstances, including the curve or curves of the track, the grade thereof, the length of the cars and the fact that there is necessarily a permissible amount of side-play in the draw-bars. Hence, if you find that the failure of these two cars to couple was solely due to the curve, the grade of the track and the non-alignment of the draw-bars, due to a permissible side-play thereof, or that such failure was solely due to any, or any combination, of said causes, the plaintiff cannot recover here, and your verdict will be in favor of The Cuyahoga Valley Railway Company." (Rec. 184.)

To supplement Instruction No. 6 and to define the terms implied in Instruction No. 6, the defendant requested the Court to instruct the jury as follows:

"I instruct you that side-play in a coupler, according to a standard in general and accepted use on railroads, does not constitute a defect in the coupler, and unless you find by a greater weight of the evidence that there was in one or both of the couplers involved in this case greater side-play than was necessary to bring about, when properly operated and given a fair trial, the automatic coupling of the cars by impact, then I say to you, as a matter of law, that neither of these couplers can be found by you to be defective in that regard. Hence I say that if, by the greater weight of the evidence, you shall find that a failure of these two cars to couple was solely due to a curve of the track and the permissible side-play of the couplers, as I have just defined it to you, or either one of these conditions, your verdict will be in favor of the Cuyahoga Valley Railway Company." (Rec. 175.)

This the Court refused. (Rec. 185.)

These instructions, we submit, were warranted by the decision of this Court in *Atlantic City Railroad v. Parker*, 242 U. S. 56; *Railway v. Jones*, 300 Fed. 525, and *Railway v. Arrington*, 126 Va. 194, 101 S. E. 415 (certiorari denied 255 U. S. 573). The Court in its general charge gave the following instruction (Rec. 191):

> "If you find, under all the evidence * * * that plaintiff's said injuries were the proximate and direct result of a defective or an insufficient coupler; that is, one, although not defective, was nevertheless inadequate for the purpose or use intended, then your finding will be for plaintiff for such compensatory damages you may find under the evidence proximately resulted to him because thereof, and not otherwise.
>
> "A defective coupler is one that, either by reason of its incomplete or faulty construction or imperfect dimensions or weak condition, renders it inoperative on use to couple automatically by impact, while an insufficient coupler is one such as I have already described to you.
>
> "The law required of defendant that it have its railroad cars equipped with couplers coupling automatically by impact. It imposed upon the defendant the positive duty that it have such couplers upon its cars, including the ones here in question, and that they be free from defect and be sufficient for such purpose—that is, for automatic coupling by impact, regardless of the kind or make, the humane purpose being primarily the protection of the employes and obviating the necessity or requirement of an employe going or being between the railroad cars. The grade and curve of the track at the point of impact in question, I construe to be, and so have instructed you, *are factors to be considered by you as to the practical operation of a railroad, and particularly upon the question of whether a coupler that merely does or does not automatically couple by impact under any and all existing conditions is or is not a defective or insufficient coupler.*"

This general instruction to the jury is obviously contrary to instruction given before argument, to-wit, No. 6, quoted *supra*. In other words, in the court's general charge he authorized the jury to return a verdict for the plaintiff if his injuries were the direct result of a defective coupler or of a coupler which although not defective was nevertheless inadequate for the purpose intended. He thereupon defines a defective coupler as "one which by reason of its incomplete or faulty construction, or imperfect dimensions or weak condition renders it inoperative" and an insufficient coupler as "a coupler not defective *but inadequate.*" In effect he instructed the jury that the failure of the coupler to operate was conclusive evidence of its defective or inadequate or insufficient condition and obviously the last sentence of the quoted general instruction does not constitute a charge to the jury to the effect that under cerain circumstances, *i.e.*, grade, curve, side-play of the draw-bars, or non-alignment of the draw-bars, the failure to couple is excused.

In other words, under the general instruction just quoted the plaintiff would be entitled to a verdict on facts which would entitle the defendant to a verdict under Instruction No. 6 given before argument.

In emphasis of the error thus committed, counsel for petitioner were permitted, with the implied approval of the Court, to argue to the jury (Rec. 185-186) in the asserted language of a court decision that—

> "The test of the observance of this duty is the performance of the appliances. The failure of a coupler to work at any time sustains the charge that the Act has been violated."

This was permitted to be done over the objection and exception of the defendant's counsel. There was no instruction by the Court to disregard the argument made and the argument made under the facts and circumstances, particularly in view of the conceded fact that the coupler did not

operate, could have had no other effect in view of the inaction of the trial judge and in view of his charge as given, *supra*, than to instruct the jury that all that was necessary to a recovery by the plaintiff was the failure of the coupler to work, a fact which was conceded. See opening statement of counsel. (Rec. 23.) It is impossible to say, under these circumstances, the jury received the issue (if one there was on the evidence) under the correct and accurate instructions which the closeness of the issue required.

Wholly aside from the error referred to, the argument of counsel was prejudicial under Ohio law. *Industrial Commission v. Gillard*, 41 O. A. 297, 179 N. E. 514, *Insurance Company v. Cheaver*, 36 O. S. 201. The practice has been condemned in *Ray v. C. & O.*, 57 W. Va. 333, 50 S. E. 413. The Federal rule does not permit such argument. *Roberts vs. Cooper*, 20 Howard 467; *Press Pub. Co. vs. McDonald*, 63 Fed. 238 (2 C. C. A.); *Brown vs. United States*, 298 Fed. 428 (2 C. C. A.).

CONCLUSION.

We, therefore, submit—

1. The judgment of the Ohio courts sustaining the contract between Gilvary and his employer as a bar to plaintiff's action is correct and should be affirmed;

2. The finding of the jury in the trial court, either that (a) there was any defect in the couplers or (b) that the condition of the couplers, if defective, was the proximate cause of plaintiff's accident is not supported by a requisite degree of proof; and

3. In any event, on account of error intervening upon trial of the action, the judgment of the trial court may not be sustained.

Respectfully submitted,

W. T. Kinder,
H. Chapman Rose,
Attorneys for Respondent.

APPENDIX A.

Ohio Constitutional and Statutory provisions with reference to Workmen's Compensation.

Sections 34 and 35 of Article II of the Constitution of Ohio, are as follows:

Section 34: "Welfare of employes.

"Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employes; and no other provision of the constitution shall impair or limit this power."

Section 35: "Workmen's Compensation.

"For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, * * *. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; * * *. When it is found, upon hearing, that an injury, disease or death resulted because of such failure

by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board. * * *"

The Workmen's Compensation Act of Ohio is found in General Code, Sections 1465-37 to 1465-110. Creation of the Industrial Commission and definition of its powers in certain respects is found in General Code, Secs. 871-1 to 871-53a.

Classification of occupations for industries, Sec. 1465-53.

Rates of Premiums, Sec. 1465-53a.

Employers subject to the law, Sec. 1465-60.

Definition of Terms, Sec. 1465-61.

Who entitled to compensation, Sec. 1465-68.

Occupational Disease, Sec. 1465-68a, *et seq.*

Non-compliance and misdemeanor, Sec. 1465-69a.

Employers complying with act not liable to respond in damages at common law or by statute, Sec. 1465-70.

Power of state in connection with enforcement of the remedies and benefits given by the act, Sec. 1465-74-75.

Preference of Judgments secured by Commission or the State under the act, Sec. 1465-77.

Power of Commission to hear and determine questions; appeal, Sec. 1465-90.

Commission not bound by technical rules of evidence, Sec. 1465-91.

No agreement by employe to waive rights to compensation under the act is valid and no employe may be required to contribute to any part of the premium, Sec. 1465-94.

Application of act to employers and employes engaged in intrastate and interstate and foreign commerce, Sec. 1465-98.

Attorney General or Prosecuting Attorney are the law officers of the Commission, Sec. 1465-100.

Contracts indemnifying employer for loss and liability under the act void, Sec. 1465-101.

The Industrial Commission created, Sec. 871-1.

Supersedeas Board of Awards, Sec. 871-12.

Employer required to protect life and safety of employes, Sec. 871-15-16.

All places of employment under Commission's supervision, Sec. 871-21.

Powers of the Commission reference enforcement of law relative to life and safety; authority with respect to hours of labor, safety devices, Sec. 871-22.

All action and proceedings under compensation law and to which Industrial Commission and State are parties are preferred over other civil actions, Sec. 871-42.

APPENDIX B.

The following is a brief summary of certain decisions of the Supreme Court of the United States permitting a state to apply its law to transactions involving interstate commerce, in spite of the regulation by Congress, in varying degrees, of the subject matter of the transactions:

In *Sherlock v. Alling*, 93 U. S. 99, it was held that, although Congress had passed statutes governing navigation of the Ohio River and providing for liability of the masters and owners of vessels in certain circumstances, Indiana might apply its wrongful death statute to claims arising from a collision, negligently caused, occurring in interstate navigation.

In *Smith v. Alabama*, 124 U. S. 465, it was held, over arguments drawn from the Commerce Clause of the Federal Constitution and the Interstate Commerce Act of 1887, that Alabama might require engineers operating only interstate trains to procure an engineer's license from an Alabama board of inspection. A somewhat similar statute requiring all engineers, firemen, conductors, etc., including those engaged in interstate commerce, to be tested for color blindness and disqualifying those found unfit was upheld in *Nashville etc. Railway v. Alabama*, 128 U. S. 96.

In *Western Union Telegraph Co. v. James*, 162 U. S. 650, it was held that the Act of 1866, regulating interstate telegraph companies and messages to some extent, did not prevent Georgia from imposing a penalty, recoverable in civil action, for failure to use due diligence in the delivery of an interstate message to the Georgia addressee.

In *Missouri, Kansas & Texas Railway v. Haber*, 169 U. S. 613, it was held that in spite of the enactment by Congress of laws penalizing the transportation in interstate commerce of cattle known to be diseased, a state might

impose civil liability for damages resulting from such transportation; and in *Reid v. Colorado*, 187 U. S. 137, it was held that a state might make importation of such diseased cattle in interstate commerce a misdemeanor, unless they had been inspected by designated state officials, or, as in *Asbell v. Kansas*, 209 U. S. 251, by the Federal authorities.

In *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477, it was held, over arguments drawn from the regulation of interstate rates and carriage by the Interstate Commerce Act, that Pennsylvania might apply to a contract for interstate carriage its common law rule forbidding a carrier to limit its liability for negligence.

In *Crossman v. Lurman*, 192 U. S. 189, it was held that an Act of Congress prohibiting importation into the United States of adulterated foods did not prohibit New York from enforcing its own prohibition against the importation of adulterated coffee beans from Brazil.

In *Missouri Pacific Ry. v. Larabee Mills*, 211 U. S. 612, it was held that the enactment of the Interstate Commerce Act did not prevent a state from forbidding discrimination between shippers in switching cars for interstate shipments, in the absence of exercise by the Interstate Commerce Commission of the power vested in it by the Act to compel equal switching facilities.

In *Savage v. Jones*, 225 U. S. 501, it was held that the Federal Food and Drugs Act, prohibiting adulteration and misbranding of foods and drugs transported in interstate commerce, did not prevent Indiana from applying to interstate sales of medicine for stock its own statute forbidding sales within the state unless the ingredients were disclosed by the label.

In *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, it was held that the Hepburn Act prohibiting passes in certain cases did not prevent the law of the state from giving

an action for wrongful death to the representatives of a decedent who was illegally using a pass.

In *Atlantic Coast Line v. Georgia;* 234 U. S. 280, and in *Vandalia Railroad v. Public Service Commission,* 242 U. S. 255, it was held that the Federal Safety Appliance Act and subsequent similar enactments dealing in part with locomotive equipment did not prevent a state from requiring that all locomotives operating within the state, including those engaged in interstate commerce, be equipped with electric headlights of given power.

In *Missouri, Kansas & Texas Ry. Co. v. Harris,* 234 U. S. 412, it was held that, though the Carmack Amendment to the Hepburn Act, in stating the measure of liability for loss of interstate shipments, did not allow recovery of attorney's fees as costs, it was competent for Texas by statute to allow such fees in its own courts to successful complainants in suits for losses of interstate shipments up to $200 in value.

SUPREME COURT OF THE UNITED STATES.

No. 575.—October Term, 1933.

John L. Gilvary, Petitioner, vs. Cuyahoga Valley Railway Company. } On Writ of Certiorari to the Supreme Court of the State of Ohio.

[April 2, 1934.]

Mr. Justice Butler delivered the opinion of the Court.

This is an action brought by petitioner to recover for personal injuries sustained by him in April, 1929, while employed by respondent as a switchman at Cleveland, Ohio. Respondent is a common carrier by railroad wholly within that State engaged in intrastate and interstate commerce. And the Safety Appliance Acts make it unlawful for it to haul or permit to be hauled or used on its line any car not equipped with couplers coupling automatically by impact.[1] In accordance with the Ohio workmen's compensation act,[2] petitioner and respondent had theretofore notified the industrial commission that they elected, in case of any injury sustained by petitioner while engaged in intrastate commerce, to have their respective rights and liabilities governed by the provisions of that Act. The commission had approved the

[1] § 2, Act of March 2, 1893, 27 Stat. 531, 45 U. S. C., § 2. § 1, Act of March 2, 1903, 32 Stat. 943, 45 U. S. C., § 8.

[2] "The provisions of this act shall apply to employers and their employes engaged in intrastate and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, and then only when such employer and any of his workmen working only in this state, with the approval of the state liability board of awards, and so far as not forbidden by any act of congress, voluntarily accept the provisions of this act by filing written acceptances, which, when filed with and approved by the board, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which the premiums herein provided have been paid. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid." G. C., § 1465-98.

agreement, respondent paid the premiums necessary to keep it in force and in all respects complied with the law. Petitioner was injured while he and respondent were engaged in intrastate commerce.

The complaint alleges that his injuries were caused by respondent's failure to comply with the Safety Appliance Acts in that cars which he, with other members of his crew, was attempting to couple were not equipped with couplers that would couple automatically by impact, thereby making it necessary for him to go between the ends of the cars where he was caught and injured. In addition to a denial of the violation of the statutes, respondent's answer sets up the election to be bound by the state compensation act. The court held that the agreement was not sufficient to constitute a defense and struck out that part of the answer. The trial resulted in a verdict and judgment for petitioner. The court of appeals reversed and gave final judgment in favor of the respondent "for the reason that the acceptance and notice of election by the employee contract approved by the Industrial Commission of Ohio is a complete bar to a right of recovery in this action". In the state supreme court, the judges being equally divided in opinion, the judgment of the court of appeals was affirmed.

As the petitioner when injured was not engaged in interstate commerce, the Federal Employers Liability Act does not apply, and the question is whether the agreement of the parties, in pursuance of the Ohio statute, is repugnant to the Federal Safety Appliance Acts.

Unless excluded by congressional enactment under the commerce clause, state law governs the respective liabilities and rights of railroad carriers and their employees growing out of injuries suffered by the latter whether in interstate or intrastate commerce. *Second Employers' Liability Cases*, 223 U. S. 1, 51. The power conferred upon the Congress is such that when exerted it excludes and supersedes state legislation in respect of the same matter. But Congress may so circumscribe its regulation as to leave a part of the subject open to state action. *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280, 290. Cf. *Napier* v. *Atlantic Coast Line*, 272 U. S. 605. The purpose exclusively to regulate need not be specifically declared. *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147. But, ordinarily such intention will not be implied unless, when fairly in-

terpreted, the federal measure is plainly inconsistent with state regulation of the same matter. *Ill. Cent. R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493, 510.

The Safety Appliance Acts govern common carriers by railroad engaged in interstate commerce. The Act of 1893 applied only to vehicles used by them in moving interstate traffic. 45 U. S. C., § 2. Its requirements were by the Act of 1903 extended to all their vehicles. *Id.*, § 8. *Southern Ry. Co.* v. *United States*, 222 U. S. 20, 26. *Moore* v. *Chesapeake & Ohio Ry. Co.*, — U. S. —, —. So far as the safety equipment of such vehicles is concerned, these Acts operate to exclude state regulation whether consistent, complementary, additional or otherwise. *Prigg* v. *The Commonwealth of Pennsylvania*, 16 Pet. 539, 617. *Southern Ry. Co.* v. *R. R. Comm., Indiana*, 236 U. S. 439, 446. *Internat. Shoe Co.* v. *Pinkus*, 278 U. S. 261, 265. The imposition of penalties (*id.*, § 6) and abrogation of assumption of risk (*id.*, § 7) are measures for enforcement.

A violation of the Acts is a breach of duty owed to an employee, whether he is at the time engaged in interstate or in intrastate commerce. And, by abolishing assumption of risk the Acts impliedly recognize the right to recover for injuries resulting therefrom. But the absence of a declaration similar to that in the Federal Employers' Liability Act, which denounces contracts and other arrangements made for the purpose of exempting carriers from liability created by that Act (45 U. S. C., § 55), strongly suggests a lack of legislative purpose to create any cause of action therefor. Moreover, if there had been such purpose, Congress probably would have included provisions in respect of venue, jurisdiction of courts, limitations, measure of damages and beneficiaries in case of death.

Petitioner cites language in *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, 41. But that case is not in point on the question under consideration in this case. There we were called upon to decide whether a railroad employee engaged in intrastate commerce upon the line of an interstate carrier was within the protection of the Safety Appliance Acts. We held that he was. The opinion supports our recent construction of these Acts that, while they prescribe the duty, the right to recover damages sustained by the injured employee through the breach "sprang from the principle of the common law" and was left to be enforced accordingly, or "in